(8)

No. 94-5707-CSY
Status: GRANTED

Title: Sharlene Wilson, Petitioner
v.
Arkansas

Docketed:
July 28, 1994

Court: Supreme Court of Arkansas

Counsel for petitioner: Hall,John Wesley

Counsel for respondent: Holt,Kent G.

Entry	Date	Note	Proceedings and Orders
1	Jul 28 1994	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Sep 1 1994		DISTRIBUTED. September 26, 1994 (Page 143)
4	Sep 6 1994		Waiver of right of respondent Arkansas to respond filed.
5	Sep 15 1994	P	Response requested -- WHR. (Due October 17, 1994)
6	Oct 17 1994		Brief of respondent Arkansas in opposition filed.
9	Oct 26 1994	X	Reply brief of petitioner filed.
7	Nov 2 1994		REDISTRIBUTED. November 23, 1994 (Page 1)
11	Nov 28 1994		Petition GRANTED.
			**********
12	Dec 22 1994		Joint appendix filed.
13	Dec 22 1994	G	Motion of petitioner for appointment of counsel filed.
14	Jan 9 1995		Motion for appointment of counsel GRANTED and it is ordered that John Wesley Hall, Esquire, of Little Rock, Arkansas, is appointed to serve as counsel for the petitioner in this case.
15	Jan 11 1995	X	Brief amici curiae of American Civil Liberties Union, et al. filed.
16	Jan 23 1995		Brief amici curiae of Americans for Effective Law Enforcement, et al. filed.
18	Jan 24 1995		Brief of petitioner Sharlene Wilson filed.
19	Jan 27 1995	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
17	Jan 30 1995		SET FOR ARGUMENT TUESDAY, MARCH 28, 1995. (2ND CASE).
20	Feb 1 1995		CIRCULATED.
21	Feb 10 1995		Record filed.
		*	Certified record proceedings Supreme Court of Arkansas.
22	Feb 10 1995	X	Brief amicus curiae of Wayne County, Michigan filed.
23	Feb 21 1995		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
24	Feb 21 1995	X	Brief amici curiae of California, et al. filed.
25	Feb 23 1995	X	Brief amicus curiae of United States filed.
26	Feb 23 1995	X	Brief of respondent Arkansas filed.
27	Mar 17 1995	X	Reply brief of petitioner filed.
29	Mar 24 1995	X	Supplemental brief of respondent filed.
28	Mar 28 1995		ARGUED.

ORIGINAL

No. _____ (3)

94-5707

In The
Supreme Court of the United States
October Term, 1994

SHARLENE WILSON,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

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QUESTION PRESENTED FOR REVIEW

Whether the "knock and announce" rule of the common law is constitutionally mandated under the Fourth Amendment.

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In The
Supreme Court of the United States
October Term, 1994

SHARLENE WILSON,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

Petitioner, Sharlene Wilson, petitions the Court for a Writ of Certiorari to review the judgment of the Supreme Court of Arkansas.

OPINION BELOW

The opinion of the Arkansas Supreme Court of July 11, 1994 is not yet reported, but it will be in 317 Ark. 548, ___ S.W.2d ___. It is reprinted in the Appendix to this Petition.

JURISDICTION

The Arkansas Supreme Court decided this case on July 11, 1994. This petition is filed within ninety days of that date and is thus timely. S. Ct. Rule 13.1.

This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the U.S. Constitution provides, in pertinent part:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, ...

The Fourteenth Amendment to the U.S. Constitution provides, in pertinent part:

> [N]or shall any state deprive any person of life, liberty or property, without due process of law; . . . .

STATEMENT OF THE CASE

Petitioner was tried before a jury and convicted of the felonies of delivery of marijuana, delivery of methamphetamine, and possession of drug paraphernalia and misdemeanor possession of marijuana. She was acquitted of delivery of methamphetamine which depended solely on the testimony of the informant and possession of methamphetamine with intent to deliver which the officers alleged came from her purse during the execution of the search warrant at issue here. She was sentenced by the jury to a total of 31 years imprisonment in the Arkansas Department of Correction on the felonies and one year imprisonment

in the county jail on the misdemeanor. She was also fined $11,000.[1] The issue in this Petition for Writ of Certiorari involves the search of her house without prior announcemment, and, thus, only the fine and the year in the county jail.

The testimony against her came from an informant cooperating to aid herself and her husband, the officer controlling the informant, and officers who executed the search warrant on her house. The affiant officer on the search warrant alleged that the confidential informant made buys of marijuana and methamphetamine from petitioner at her house. The same officer watched petitioner leave her house to meet with the informant for a controlled buy, which he also observed.

Four officers executed the search warrant at petitioner's home on December 31, 1992. Petitioner, her husband, and two friends were inside. One of the officers at the front of the raiding party, Henry Efird, heard no announcement; the officers just walked in. Another officer, Roger Walls, testified that one of them stated what they were there to search as they walked in, not before. At any rate, it is clear that petitioner and the others

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[1] Petitioner was charged with six counts in three case numbers, and the result was as follows:

Guilty on delivery of marijuana (a felony) on November 22, 1992 to informant, 6 years;
Guilty on delivery of methamphetamine (a felony) on November 23, 1992 to informant, 25 years;
Not guilty of delivery of methamphetamine (a felony) on December 30, 1992 to informant;
Guilty on possession of drug paraphernalia (a felony) on December 31, 1992 from the search, $10,000 fine;
Guilty of possession of marijuana (a misdemeanor) on December 31, 1992 from the search, one year and $1,000 fine; and
Not guilty of possession of methamphetamine (a felony) on December 31, 1992 from the search.

were given no opportunity to surrender their privacy to the officers.

On appeal to the Arkansas Supreme Court, the court held that the officers complied with Rule 13.3(e) of the Arkansas Rules of Criminal Procedure in conducting the search without prior announcement, and that the Fourth Amendment does not contain a "knock and announce" requirement (petitioner's comments are added by footnotes in brackets):

> . . . Ms. Wilson submits the officers executing the search failed to knock and announce their identity before entering the residence. The testimony indicated that the officers entered the home while they were identifying themselves.[2] Ms. Wilson relies upon *Miller v. United States*, 357 U.S. 301 (1958), as the sole authority[3] for her argument. . . . However, *Miller* involved a statute, 18 U.S.C. § 3109, which specified that a law enforcement officer, executing a search warrant, may break open a door only if, "after notice of his authority and purpose," he is denied admittance. The Fourth Amendment was not mentioned.
>
> There is no authority for Ms. Wilson's theory that the knock and announce principle is required for the Fourth Amendment.[4] Furthermore, Ark. R. Crim. P. 13.3 outlines the procedure to be followed in the execution of a search warrant, and provides in part:
>
> > (e) The executing officer, and other officers accompanying and assisting him, may use such degree of force, short of force, against persons, or to effect entry or to open containers as is reasonably necessary for the successful execution of the search warrant with all practicable safety.
>
> Rule 13.3 does not contain a "knock and announce" rule. *See also Dodson v. State*, 4 Ark.App. 1, 626 S.W.2d 624 (1982) (Glaze, J., concurring), *cert. denied*, 457 U.S. 1136 (1982).

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[2] As noted, one officer testified that another said that they had a search warrant as they were entering. Another officer testified that he heard nothing.

[3] It is *not* the "sole authority" petition relied on. *See* her Appellant's Brief at 52-53 citing *Miller*, *Ker*, and *Sabbath*, all *infra*.

[4] That is the reason we are here.

Wilson v. State, CR94-160, slip op. at 7-8 (bracketed material added), App. 7-8.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE "KNOCK AND ANNOUNCE" RULE OF THE COMMON LAW IS A REQUIREMENT OF THE FOURTH AMENDMENT.

A.

The "knock and announce" requirement derives from the common law,[5] and it was first articulated four centuries ago in *Semayne's Case*, 5 Co.Rep. 91a, 91b, 77 Eng.Rep. 194, 195 (1603). The purpose underlying the rule back then; *i.e.*, giving the occupant or homeowner the opportunity to surrender his or her privacy to the law to avoid a great potential for violence; is just as valid today, if not more so, given the fact there are hundreds of millions of firearms in American homes and the propensity and regular need for narcotics officers to raid houses in plainclothes without announcing.

This Court has never directly held that the "knock and announce" rule is a part of the Fourth Amendment, and it is time to do so. There are valid and important exceptions to the "knock and announce" requirement which, even if petitioner's prevails, would still be the

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[5] *See generally* Blakely, *The Rule of Announcement and Unlawful Entry:* Miller v. United States *and* Ker v. California, 112 U.PA.L.REV. 499 (1964); Note, *Announcement* in Police Entries, 80 YALE L.J. 139 (1970); Sonnenreich & Ebner, *No-Knock and Nonsense: An Alleged Constitutional Problem*, 44 ST. JOHN'S L.REV. 626 (1970).

law.[6]

B.

In *Ker v. California*, 374 U.S. 23, 47-49 (1963), Justice Brennan, concurring for himself and three others, found that the common law requirement of announcement is embodied in the Fourth Amendment.

> It was firmly established long before the adoption of the Bill of Rights that the fundamental liberty of the individual includes protection against unannounced police entries. "[T]he Fourth Amendment did but embody a principle of English liberty, a principle old, yet newly won, that finds another expression in the maxim 'every man's home is his castle.'" Fraenkel, Concerning Searches and Seizures, 34 Harv.L.Rev. 361, 365 (1921); *Frank v. Maryland*, 359 U.S. 360, 376-382 (dissenting opinion). As early as *Semayne's Case*, 5 Co.Rep. 91a, 91b, 77 Eng.Rep. 194, 195 (1603), it was declared that "[i]n all cases when the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K[ing]'s process, if otherwise he cannot enter. *But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors* * * *.' (Emphasis supplied.) Over a century later the leading commentators upon the English criminal law affirmed the continuing vitality of that principle. 1 Hale, Pleas of the Crown (1736), 583; see also 2 Hawkins, Pleas of the Crown (6th ed. 1787), c. 14, § 1; Foster, Crown Law (1762), 320-321. Perhaps its most emphatic confirmation was supplied only 35 years before the ratification of the Bill of Rights. In *Curtis' Case*, Fost. 135, 168 Eng.Rep. 67, decided in 1756, the defendant, on trial for the murder of a Crown officer who was attempting an entry to serve an arrest warrant, pleaded that because the officer had failed adequately to announce himself and his mission before breaking the doors, forceful resistance to his entry was justified and the killing was therefore justifiable homicide. In recognizing the defense the court repeated the principle that "peace-officers, having a legal warrant to

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[6] *Miller*, *Ker*, and *Sabbath* all involved exceptions to the rule.

See, e.g., 2 W. LAFAVE, SEARCH AND SEIZURE § 4.8 (2d ed.1987); 2 J. HALL, SEARCH AND SEIZURE §§ 44:2-44:13 (2d ed.1993); Annot., *What constitutes violation of 18 USCS § 3109 requiring federal officer to give notice of his authority and purpose prior to breaking open door or window or other part of house to execute search warrant*, 21 A.L.R.Fed. 820 (1974); Annot., *What constitutes compliance with knock-and-announce rule in search of premises—state cases*, 70 A.L.R.3d 217 (1976).

arrest for a breach of the peace, may break open doors, *after having demanded admittance and given due notice of their warrant";* the court continued that "no precise form of words is required in a case of this kind" because "[i]t is sufficient that the party hath notice, that the officer cometh not as a mere trespasser, but claiming to act under a proper authority * * *." Fost., at 136-137, 168 Eng.Rep., at 68. (Emphasis supplied.) The principle was again confirmed not long after the Fourth Amendment became part of our Constitution. ABBOTT, C.J., said in *Launock v. Brown,* 2 B. & Ald. 592, 593-594, 106 Eng.Rep. 482, 483 (1819):

> "* * * I am clearly of opinion that, in the case of a misdemeanour, such previous demand is requisite * * *. It is reasonable that the law should be so; for if no previous demand is made, how is it possible for a party to know what the object of the person breaking open the door may be? He has a right to consider it as an aggression on his private property, which he will be justified in resisting to the utmost."

The protections of individual freedom carried into the Fourth Amendment, *Boyd v. United States,* 116 U.S. 616, 630, undoubtedly included this firmly established requirement of an announcement by police officers of purpose and authority before breaking into an individual's home. The requirement is no mere procedural nicety or formality attendant upon the service of a warrant. Decisions in both the federal and state courts have recognized, as did the English courts, that the requirement is of the essence of the substantive protections which safeguard individual liberty. (emphasis in original)

Five members of Court, however, did not reach the question of whether the "knock and announce" rule was a Fourth Amendment requirement.[7]

C.

In two other cases, the Court applied the "knock and announce" rule, but it did not hold that the rule was a part of the Fourth Amendment. Before *Ker,* in *Miller v. United States,* 357 U.S. 301, 307-09 (1957), the Court construed the federal knock and announce

[7] *See also Miller v. United States, infra,* 357 U.S. at 306-09 (discussing common law history in construing the federal knock and announce statute).

statute, 18 U.S.C. § 3109, and held that it was a codification of the common law. After *Ker,* in *Sabbath v. United States,* 391 U.S. 585, 591 n.8 (1968), the Court held that there were exceptions to the "knock and announce" rule.

> Exceptions to any possible constitutional rule relating to announcement and entry have been recognized, see *Ker v. California, supra,* 374 U.S. at 47 (opinion of BRENNAN, J.), and there is little reason why those limited exceptions might not also apply to § 3109, since these existed at common law, of which the statute is a codification.

By *Sabbath,* it seemed that the "knock and announce" rule had almost gained constitutional status. *See* Note, *The Knock and Announce Rule: A New Approach to the Destruction of Evidence Exception,* 93 COLUM.L.REV. 685, 685 (1993) (*Ker* constitutionalized "knock and announce"). Nevertheless, the Court has never so held.

D.

The common law at the time of the adoption of the Fourth Amendment has long provided significant, if not decisive guidance, as to what the Framers of the Fourth Amendment thought was a reasonable search, particularly involving the sanctity of the home. *Payton v. New York,* 445 U.S. 573, 591 & n.33 (1980); *Steagald v. United States,* 451 U.S. 204, 217 (1981) ("The common law may, within limits, be instructive in determining what sorts of searches the Framers of the Fourth Amendment regarded as reasonable."). *See also Tennessee v. Garner,* 471 U.S. 1, 13 (1985) ("It is true that this Court has often looked to the common law in evaluating reasonableness, for Fourth Amendment purposes, of police activity."). *Semayne's Case* was relied on by the Court in two if its "knock and announce" cases; *Ker, supra,* and *Miller,* 357 U.S. at 308; and two cases

involving searches of the home; *Payton,* 445 U.S. at 592-93; *Steagald,* 451 U.S. at 217.

But, "[t]here are important differences between the common-law rules relating to searches and seizures and those that have evolved through the process of interpreting the fourth amendment in light of contemporary norms and conditions." *Payton, supra,* 445 U.S. at 591 n.33. *Accord: Steagald,* 451 U.S. at 217 n.10 (common law rules developed in simpler times); *Garner, supra* (same). In the area of curtilage, for example, the common law was virtually controlling; *California v. Ciraolo,* 476 U.S. 207, 212 (1986); *United States v. Dunn,* 480 U.S. 294, 300 (1987); but trespass has been the only real recognized exception to finding the common law controlling. *Hester v United States,* 265 U.S. 57 (1924); *Oliver v. United States,* 466 U.S. 170, 180 (1984).

Some members of the Court have looked to the common law as the touchstone of Fourth Amendment "reasonableness." *See, e.g., California v. Acevedo,* 111 S.Ct. 1982, 1993 (1991) (SCALIA, J., concurring in the judgment); *County of Riverside v. McLaughlin,* 111 S.Ct. 1661, 1672 (1991) (SCALIA, J., dissenting); *California v. Hodari D.,* 111 S.Ct. 1547, 1553 (1991) (STEVENS & MARSHALL, JJ., dissenting).

E.

The "knock and announce" rule is one of the oldest in the law, having gained its first judicial recognition nearly four hundred years ago and 188 years before adoption of the Fourth Amendment. The Court should grant certiorari to decide once and for all whether it is a part of the Fourth Amendment,[8] particularly in light of the overwhelming number of

[8] The exceptions to the "knock and announce" requirement already recognized in the cases would still be exceptions under the Fourth Amendment.

jurisdictions holding that it is.

II.

CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS AND STATES ON WHETHER THE "KNOCK AND ANNOUNCE" RULE IS A REQUIREMENT OF THE FOURTH AMENDMENT.

While the Court has not directly held that the common law "knock and announce" requirement is a part of the Fourth Amendment, numerous federal[9] and state[10] courts have

[9] *See, e.g., Rivera v. United States,* 928 F.2d 592 (2d Cir.1991); *United States v. Nolan,* 718 F.2d 589, 600-02 (3d Cir.1983); *United States v. Mueller,* 902 F.2d 336, 343-44 n.6 (5th Cir.1990); *United States v. Sagaribaz,* 982 F.2d 906 (5th Cir.1993), *cert.denied,* 114 S.Ct. 160; *United States v. Francis,* 646 F.2d 251, 258 (6th Cir.), *cert. denied,* 454 U.S. 1082 (1981); *United States v. Agrusa,* 541 F.2d 690, 697 (8th Cir.1976), *cert. denied,* 429 U.S. 1045; *United States v. Valenzuela,* 596 F.2d 824, 830 (9th Cir.), *cert. denied,* 441 U.S. 965; *United States v. Baker,* 638 F.2d 198, 202 (10th Cir.1980).

[10] *See, e.g.: State v. Wright,* 131 Ariz. 578, 643 P.2d 23, 25 (App.1982); *People v. Jacobs,* 43 Cal.3d 472, 233 Cal.Rptr. 323, 729 P.2d 757, 764 (1987); *People v. Gonzalez,* 211 Cal.App.3d 1043, 259 Cal.Rptr. 846, 848 (1989); *Marvel v. State,* 290 A.2d 641 (Del.1972); *Gregory v. State,* 616 A.2d 1198, 1200 (Del.1992); *Benefield v. State,* 160 So.2d 706, 710 (Fla.1964); *see Napoli v. State,* 596 So.2d 782, 783-84 (Fla.App.1992); *State v. Dusch,* 289 N.E.2d 515, 517 (Ind.1972); *State v. Brown,* 253 N.W.2d 601, 602 (Iowa 1977); *State v. Cohrs,* 484 N.W.2d 223, 225 (Iowa 1992); *State v. Tyler,* 251 Kan. 616, 840 P.2d 413, 428 (1992); *People v. Polidor,* 190 Mich.App. 673, 476 N.W.2d 482, 484 (1991), *app. denied,* 439 Mich. 918, 479 N.W.2d 636, *cert. denied,* 113 S.Ct. 298 (1992); *State v. Pierson,* 238 Neb. 872, 472 N.W.2d 898, 901 (1991) (apparently so holds); *State v. Sanchez,* 88 N.M. 402, 540 P.2d 1291, 1292 (1975); *State v. Baca,* 87 N.M. 12, 528 P.2d 656 (App.1974); *State v. Williams,* 114 N.M. 485, 840 P.2d 1251, 1253-55 (App.1992); *State v. Sakellson,* 379 N.W.2d 779, 783 (N.D.1985); *State v. Valentine,* 264 Or. 54, 504 P.2d 84, 85 (1972); *State v. Gassner,* 6 Or.App. 452, 485 P.2d 822, 824 (1971); *State v. Bost,* 114 Or.App. 519, 837 P.2d 536, 539 (1992), *rev'd on other grounds,* 317 Ore. 538, 857 P.2d 132, 136 (1993) (exigency shown); *Commonwealth v. Newman,* 429 Pa. 441, 240 A.2d 795, 599 (1968); *Commonwealth v. Chambers,* 385 Pa.Super. 605, 561 A.2d 1257 (1989); *Commonwealth v. Bull,* 426 Pa.

held or assumed that the "knock and announce" requirement is a part of the Fourth Amendment's requirement of "reasonableness" of searches. Nearly every state has a statute authorizing use of force to enter premises after announcement to search or arrest.[11]

Super. 67, 618 A.2d 1019 (1993); *State v. Carufel,* 112 R.I. 664, 413 A.2d 144, 147 (1974); *Keith v. State,* 542 S.W.2d 839, 841 (Tenn.Cr.App.1976); *State v. Garcia-Hernandez,* 67 Wash.App. 492, 837 P.2d 624, 627 (1992); *State v. Coyle,* 95 Wash.2d 1, 621 P.2d 1256, 1261-62 (1980); *State v. Stevens,* 181 Wis.2d 410, 511 N.W.2d 591, 594-95 (1994); *State v. Cleveland,* 114 Wis.2d 213, 338 N.W.2d 500 (App.), *aff'd,* 118 Wis.2d 615, 368 N.W.2d 512 (1983).

[11] Virtually all the state statutes and rules read in the common law rule if the common law rule is not written into the statute:

Alabama: Ala.Code § 15-5-9 (notice)
Alaska: Alaska Stat. § 12.25.040 (breaking permitted; notice not mentioned)
Arizona: Ariz.Rev.Stat. § 13-3916 (notice)
Arkansas: Ark.R.Crim.P. 13.3(e) (breaking permitted; notice not mentioned)
California: Cal.Penal Code § 1531 (notice and breaking)
Colorado: Colo.Rev.Stat. § 16-3-304(b) (such force as is necessary)
Connecticut: none
Delaware: none
D.C.: D.C. Code § 23-524(b) (notice and breaking permitted)
Florida: Fla.Stat.Ann. § 933.09 (notice and breaking permitted)
Georgia: Ga.Code Ann. § 17-5-27 (notice and reasonable force permitted)
Hawaii: Haw.Rev.Stat. § 803-37 (notice and breaking permitted)
Idaho: Idaho Code § 19-4409 (notice and breaking permitted)
Illinois: 725 I.L.C.S. § 5/108-8 (force; no knock provision)
Indiana: Ind.Stat.Ann. § 35-33-5-7 (notice and breaking permitted)
Iowa: Iowa Code Ann. § 808.6 (notice and breaking permitted)
Kansas: Kan.Stat.Ann. § 22-2508 (notice and reasonable force permitted)
Kentucky: Ky.Rev.Stat. § 70.078 (notice and breaking permitted)
Louisiana: La.Stat.Ann., C.Cr.P. Art. 164, 224 (notice and breaking permitted)
Maryland: none
Massachusetts: none
Michigan: Mich.C.Laws Ann. § 780.656 (notice and breaking permitted)
Mississippi: Miss.Code Ann. § 41-29-157(c) (notice and breaking permitted; no knock in drugs cases permitted)
Missouri: V.A.M.S. § 544.200 (notice and breaking permitted)
Nebraska: Rev.Stat.Neb. § 29-411 (notice and breaking permitted)
Nevada: N.R.S. § 179.055(1) (notice and breaking permitted)

A small minority of courts have held that the "knock and announce" requirement is not constitutionally compelled,[12] and, along that same line, others held that a bad enough violation of the requirement would violate the Fourth Amendment's reasonableness require-

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New Hampshire: none
New Jersey: N.J.S.A. § 33:1-58 (intoxicating liquor only on statute)
New Mexico: none
New York: N.Y. Crim.Pro.L. § 690.50 (notice and breaking permitted)
North Carolina: G.S.N.C. § 15A-251 (notice and breaking permitted)
North Dakota: N.D.C.C. § 29-29-08 (notice and breaking permitted)
Ohio: Ohio Rev.Code §§ 2935.12 (notice and breaking permitted) & 2933.231 (no knock permitted)
Oklahoma: 22 Okla.Stat.Ann. § 1228 (notice and breaking permitted)
Oregon: Or.Rev.Stat.Ann. § 133.575(2) (notice and breaking permitted)
Pennsylvania: Pa.R.Crim.Pro. 2007 (notice and breaking permitted)
Puerto Rico: 34 L.P.R.A. § 1819 (notice and breaking permitted)
Rhode Island: G.L.R.I. § 12-7-8 (reasonable force)
South Carolina: none
South Dakota: S.D.C.C. §§ 23A-35-8 (notice and breaking permitted) & 23A-35-9 (no knock permitted)
Tennessee: Tenn.Code Ann. § 40-7-107 (notice and breaking permitted)
Texas: Vernon's Tex. Stat. Ann., C.Cr.P. Art. 18.06(b) (notice and breaking permitted)
Utah: Utah Code Ann. § 77-23-210 (notice and breaking permitted; no knock permitted)
Vermont: none
Virgin Islands: 5 V.I.C. § 3904 (notice and breaking permitted)
Washington: R.C.W.A. § 10.31.040 (notice and breaking permitted)
West Virginia: W.Va.C. § 62-1A-5 (notice and breaking permitted)
Wisconsin: Wis.Stat.Ann. § 968.14 (notice and breaking permitted)
Wyoming: Wyo.Stat.Ann. § 7-7-104 (notice and breaking permitted)

[12] *See, e.g.: Wilson v. State,* CR94-160 (July 11, 1994), slip op. at 7-8; *People v. Saechao,* 129 Ill.2d 522, 136 Ill.Dec. 59, 544 N.E.2d 745, 749 (1989); *Commonwealth v. Cundriff,* 382 Mass. 137, 415 N.E.2d 172 (1980), *cert. denied,* 451 U.S. 973 (1981); *Commonwealth v. Scalise,* 387 Mass. 413, 439 N.E.2d 818 (1982); *Commonwealth v. Sepulveda,* 406 Mass. 180, 546 N.E.2d 879, 880 (1989); *Commonwealth v. Goggin,* 412 Mass. 200, 587 N.E.2d 785 (1992); *Heaton v. Commonwealth,* 215 Va. 137, 207 S.E.2d 829, 831 (1974) (*but see Wynne v. Commonwealth,* 427 S.E.2d 228 (Va.App. 1993)).

ment even if not compelled.[13] Some courts have reserved the constitutional question.[14]

The Court should grant certiorari to resolve this conflict.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner

July 26, 1994

[13] *State v. Jones*, 124 N.H. 515, 503 A.2d 802, 804-06 (1985); *State v. Thompson*, 571 A.2d 266, 268-69 (N.H.1990).

[14] *State v. Thurman*, 846 P.2d 1256, 1262 (Utah 1993).

RECEIVED
JUL 12 1994

SUPREME COURT OF ARKANSAS

No. CR94-160

Opinion Delivered JUL 11 1994

SHARLENE WILSON, APPELLANT, V. STATE OF ARKANSAS, APPELLEE,	APPEAL FROM THE HOT SPRING COUNTY CIRCUIT COURT, NO. CR93-1-1, CR93-63-1 HON. JOHN W. COLE, JUDGE, AFFIRMED.

STEELE HAYS, Associate Justice

Appellant Sharlene Wilson was tried and convicted of possession of marijuana, delivery of marijuana, delivery of methamphetamine, and possession of drug paraphernalia. The jury sentenced her to a total of thirty-one years imprisonment in the Arkansas Department of Correction and one year imprisonment in the Hot Spring County Jail. She was fined a total of $11,000. On appeal Ms. Wilson charges the trial court with two errors: (1) denying her motion to dismiss based upon outrageous police conduct and (2) denying her motion to suppress the fruits of the search of her residence. Finding no error, we affirm the judgment of conviction.

Ms. Wilson was incarcerated in the Malvern City Jail awaiting trial. She was represented by counsel at the time. Officers with the Seventh Judicial District Drug Task Force wired an informant and sent her into the appellant's cell. After a brief conversation with the informant, Ms. Wilson discovered the transmitter. At no

time did Ms. Wilson incriminate herself or supply any information pertinent to her case.

Officer Roger Walls testified he had information that Bryson Jacobs, who had been living with Ms. Wilson, was planning an escape from the Hot Spring County Jail. According to Walls's testimony, the informant was sent into the cell to uncover the plans for escape. However, other officers testified to a dual purpose in the use of the informant: to obtain information which could be used against Ms. Wilson and to obtain information regarding the escape.

The appellant moved to dismiss the charges against her based upon a Sixth Amendment violation. Ms. Morrison contends the outrageous conduct of the officers warranted the extreme remedy of dismissal of the charges. Because we find that no prejudice occurred, we will assume, arguendo, that the Sixth Amendment was violated under the circumstances of this case.

In *United States v. Morrison*, 449 U.S. 361 (1981), the United States Supreme Court held that "absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the [Sixth Amendment] violation may have been deliberate." (Emphasis supplied.) Factually, Ms. Morrison had retained counsel to represent her in the pending criminal proceedings. Thereafter, two agents of the Drug Enforcement Agency, aware that she had been indicted and had retained counsel, sought to obtain her cooperation in a related investigation. They met with her without the knowledge or permission of her counsel. The agents told her it would be to her advantage if she cooperated

but she would face a stiff jail term if she did not. At no time did Ms. Morrison incriminate herself or supply any information pertinent to her case. Ms. Morrison moved to dismiss the indictment. In determining that dismissal of the indictment was not appropriate, the Court noted:

> [W]hen before trial but after the institution of adversary proceedings, the prosecution has improperly obtained incriminating information from the defendant in the absence of his counsel, the remedy characteristically imposed is not to dismiss the indictment but to suppress the evidence or to order a new trial if the evidence has been wrongfully admitted and the defendant convicted. In addition, certain violations of the right to counsel may be disregarded as harmless error. [Citations omitted.]

Similarly, in *Massiah v. United States*, 377 U.S. 201 (1964), the Court held that where a Sixth Amendment violation has occurred the defendant's own incriminating statements could not constitutionally be used by the prosecution as evidence against him at his trial. Once again, Mr. Massiah had retained counsel. While he was free on bail a federal agent succeeded by surreptitious means in listening to incriminating statements made by him. At Mr. Massiah's trial these incriminating statements were brought before the jury. The Court held that Mr. Massiah was denied the basic protections guaranteed by the Sixth Amendment when such evidence was used against him at his trial.

Ms. Wilson acknowledges the holdings in *Morrison* and *Massiah*; however, she submits we should reverse and dismiss under Ark. Const. Art. 2, § 8 and § 10. We find the cited provisions of the Arkansas Constitution do not provide for such relief. Further, the appellant fails to allege she suffered any prejudice as a result of the surreptitious actions. We have repeatedly held that an appellant must show prejudice, because this Court will not reverse for harmless error. *Heinze v. State*, 309 Ark. 162, 827 S.W.2d 658 (1992).

It is troubling to find in this record a clear implication that public officials charged with enforcement of law would, in concert, pursue a course calculated to circumvent fundamental provisions thereof. Not the least of our concerns is the fact that had the plan succeeded, the prosecution of these offenses would have been seriously jeopardized.

Turning to the second point, officers with the Saline County Sheriff's Office and the Seventh Judicial District Drug Task Force executed a search warrant at the home of the appellant. Officer Henry Efird's affidavit in support of the warrant recited that a confidential informant had made purchases of marijuana and methamphetamine from the appellant at the residence. Further, Officer Efird observed Ms. Wilson leave her residence and proceed to a meeting with the informant. At that time, the officer observed a transaction between Ms. Wilson and the informant.

During the search of Ms. Wilson's home, the officers discovered an amount of marijuana, an amount of methamphetamine,

and drug paraphernalia. The appellant moved to suppress the evidence seized in the search on the ground that the affidavit contained omissions of fact which were material to the finding of probable cause and on the ground that the officers failed to "knock and announce."

At the suppression hearing, Ms. Wilson contended three exculpatory items were omitted from the affidavit. First, the affidavit failed to disclose that the informant and her husband had been arrested and that she had agreed to cooperate in order to help herself and her husband. Second, the affidavit failed to disclose that Ms. Wilson declined to sell drugs to the informant on prior occasions. Third, the affidavit failed to disclose that when a buy allegedly occurred, the drugs did not come directly from Ms. Wilson's home. Ms. Wilson contends that had these omissions been included in the affidavit it would have undermined the informant's credibility to the point that probable cause would be lacking. The trial court denied Ms. Wilson's motion to suppress the evidence.

In reviewing a trial court's ruling on a motion to suppress, we consider the totality of the circumstances to determine if the trial court's decision was clearly against the preponderance of the evidence. *Pyle v. State*, 314 Ark. 165, 862 S.W.2d 823 (1993). We consider the facts in the light most favorable to the appellee. *Id.* Under *Franks v. Delaware*, 438 U.S. 154 (1978), a warrant should be invalidated if a defendant shows by a preponderance of the evidence that: (1) the affidavit contained a false statement which was made knowingly, intentionally, or recklessly by the

affiant and (2) the false statement was necessary to a finding of probable cause.

In *Pyle*, supra, we concluded that even with omissions there must be a knowing intent to deceive, or a reckless disregard of truth. Further, we found the omissions must involve material circumstances which contradict or dispel the incriminating factors in the affidavit. As to the informant's motive for cooperation in the instant case, such an omission simply does not contradict or dispel the incriminating factors in the affidavit. Also, Officer Efird independently corroborated most of the information supplied by the informant which constitutes "particular facts bearing on the informant's reliability." *See* Ark. R. Crim. P. 13.1. Second, we have specifically recognized that the omission of refusals to sell drugs on other occasions does not amount to deception by negation. *Pyle*, supra. Finally, applying the *Pyle* standard, where Ms. Wilson obtained the drugs is immaterial to the incriminating factors in the affidavit.

Even if the omissions were material, probable cause is present in the warrant. Officer Efird stated that he followed Ms. Wilson from her house to a meeting with the informant. Officer Efird observed a drug transaction. Thus, the credibility of the informant is not an issue regarding probable cause. Further, as there was probable cause to believe Ms. Wilson possessed drugs at her residence, where she obtained or manufactured the drugs is irrelevant.

As an additional ground for suppression of the fruits of the

search, Ms. Wilson submits the officers executing the search failed to knock and announce their identity before entering the residence. The testimony indicated that the officers entered the home while they were identifying themselves. Ms. Wilson relies upon *Miller v. United States*, 357 U.S. 301 (1958), as the sole authority for her argument. The appellant contends, based upon *Miller*, that the Fourth Amendment requires officers to knock and announce prior to entering the residence. However, *Miller* involved a statute, 18 U.S.C. § 3109, which specified that a law enforcement officer, executing a search warrant, may break open a door only if, "after notice of his authority and purpose," he is denied admittance. The Fourth Amendment was not mentioned.

There is no authority for Ms. Wilson's theory that the knock and announce principle is required by the Fourth Amendment. Furthermore, Ark. R. Crim. P. 13.3 outlines the procedure to be followed in the execution of a search warrant, and provides in part:

> (e) The executing officer, and other officers accompanying and assisting him, may use such degree of force, short of deadly force, against persons, or to effect entry or to open containers as is reasonably necessary for the successful execution of the search warrant with all practicable safety.

Rule 13.3 does not contain a "knock and announce" rule. *See also Dodson v. State*, 4 Ark. App. 1, 626 S.W.2d 624 (1982) (Glaze, J.,

concurring), *cert. denied*, 457 U.S. 1136 (1982).

In sum, we find no error and affirm the judgment of conviction.

RESPONSE REQUESTED

ORIGINAL

No. 94-5707

Supreme Court, U.S.
FILED
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

SHARLENE WILSON — PETITIONER

V.

STATE OF ARKANSAS — RESPONDENT

ON WRIT TO CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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15 pp

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BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent responds to petitioner's petition for writ of certiorari to the Supreme Court of Arkansas.

JURISDICTION

Respondent acknowledges that this Court has discretionary jurisdiction to review this case pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The petitioner's statement of the case is sufficient to apprise the Court of the facts of this case relating to the question presented for review.

REASONS FOR DENYING THE WRIT

I.

CERTIORARI SHOULD BE DENIED AS THE "KNOCK AND ANNOUNCE" RULE IS NOT EMBODIED WITHIN THE FOURTH AMENDMENT.

The petitioner argues that this Court should nationalize the "knock and announce" rule by reading it into the Fourth Amendment. Petitioner claims that such a rule is necessary to resolve a conflict among the states.

The State of Arkansas, as respondent, submits that there is no conflict between the states as petitioner alleges. Some states have made the "knock and announce" rule a part of the body of law regulating police procedure. What petitioner describes as a "conflict" among the states is no more than each state, through its courts and legislatures, adopting procedures, some strict and some less strict, all coming within the ambit of the Fourth Amendment.

Arkansas Rules of Criminal Procedure 13.3 provides for the manner in which a search warrant is to be executed; however, it is silent with regard to the "knock and announce" rule.[1]

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[1]A.R.Cr.P. 13.3 provides:

(a) A search warrant may be executed by any officer. The officer charged with its execution may be accompanied by such other officers or persons as may be reasonably necessary for the successful execution of the warrant with all practicable safety.

(b) In the course of any search or seizure pursuant to the warrant, the executing officer shall give a copy of the warrant to the person to be searched or the person in apparent control of the premises to be searched. The copy shall be furnished before undertaking the search or seizure unless the officer has reasonable cause to believe that such action would endanger the successful execution of the warrant with all practicable safety, in which case he shall, as soon as is practicable, state his authority and purpose and furnish a copy of the warrant. If the premises are unoccupied by anyone in apparent and responsible control, the officer shall leave a copy of the warrant suitably affixed to the premises.

(c) The scope of search shall be only such as is authorized by the warrant and is reasonably necessary to discover the persons or things specified therein. Upon discovery of the persons or things so specified, the officer shall take possession or custody of them and search no further under authority of the warrant. If in the course of such search, the officer discovers things not specified in the warrant which he reasonably believes to be subject to seizure, he may also take possession of the things so discovered.

(d) Upon completion of the search, the officer shall make and deliver a receipt fairly describing the things seized to the person from whose possession they are taken or the person in apparent control of the premises from which they are taken. If practicable, the list shall be prepared in the presence of the person to whom the receipt is to be delivered. If the premises are unoccupied by anyone in apparent and responsible control, the executing officer shall leave the receipt suitably affixed to the premises.

(e) The executing officer, and other officers accompanying and assisting him, may use such degree of force, short of deadly force, against persons, or to effect an entry or to open containers as is reasonably necessary for the successful execution of the search warrant for all practicable safety. The use of deadly force in the execution of a search warrant, other than in self-defense or

Petitioner further argues this Court is required to determine whether the "knock and announce" rule is embodied within the Fourth Amendment since there are "hundreds of millions of firearms in American homes and the propensity and regular need for narcotics officers to raid houses in plainclothes without announcing." (Petition at page 12) The respondent submits that just such a condition argues in favor of its position where the high incidence of firearms near at hand to those engaged in the trafficking of illegal drugs makes the element of surprise imperative, enabling police officers to gain control of a potentially life threatening situation and preventing the destruction of evidence. While a majority of states may require notice, one of the "notice" states has specifically exempted the requirement from cases where drugs are the focus of the search. Miss. Code Ann. § 41-29-157(c).

The petitioner cites the concurring opinion of Justice Brennan of Ker v. California, 374 U.S. 23 (1963) in favor of

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> defense of others, is justifiable only if the executing officer reasonably believes that there is a substantial risk that the persons or things to be seized will suffer, cause, or be used to cause death or serious bodily harm if their seizure is delayed, and that the force employed creates no unnecessary risk of injury to other persons.

See also Dodson v. State, 4 Ark. App. 1, 626 S.W.2d 624 (1982)(Glaze, J., concurring), cert. denied, 457 U.S. 1136 (1982).

her argument that the "knock and announce" rule is embodied in the Fourth Amendment. The majority opinion in Ker stated as follows:

> The States are not thereby precluded from developing workable rules governing arrest, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the states, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain . . .

374 U.S. 23 at 34.

Petitioner goes on to cite Miller v. United States, 357 U.S. 301 (1958) and Sabbath v. United States, 391 U.S. 585 (1968) in support of her position. All three cases involved police officers guided by the federal rule, 18 U.S.C. § 3109. What is notable in the instant case, unlike those cited by the petitioner, is that the police officers here were armed with a valid search warrant. The Fourth Amendment requires that a neutral magistrate review the factual justification for the search. The Fourth Amendment does not give suspects warning to either dispose of evidence or arm themselves against the police.

Police procedure has long been held to be worked out by the different states with this Court providing a broad outline as to the requirements of the Constitution. What the

petitioner regards as conflict is, in reality, flexibility.

This Court should deny certiorari as no conflict exists.

CONCLUSION

The Rules of the Supreme Court state that review on writ of certiorari will only be granted when there are special and important reasons therefor. This case contains no issue worthy of such review. The point raised by the petitioner does not demonstrate that constitutional error has occurred. Therefore, for the reasons and authorities cited above, respondent respectfully prays that this Court deny review on writ of certiorari.

Respectfully submitted,

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October 17, 1993

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Mr. William K. Suter
Clerk of the Court
United States Supreme Court
No. 1 First Street, N.E.
Washington, D.C. 20543

RE: Sharlene Wilson v. State of Arkansas
October Term 1994, No. 94-5707

Dear Mr. Suter:

Please find enclosed for filing the original and eleven (11) copies of the respondent's brief in opposition to petition for writ of certiorari in the above-styled case. Opposing counsel has been served as indicated on the enclosed certificate of service.

Sincerely,

CLINT MILLER
Acting Deputy Attorney General
(501) 682-3657

CM:jt
Enclosure

200 Tower Building, 323 Center Street ● Little Rock, Arkansas 72201-2610

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NO. 94-5707

IN THE SUPREME COURT OF THE UNITED STATES
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SHARLENE WILSON — PETITIONER

V.

STATE OF ARKANSAS — RESPONDENT

CERTIFICATE OF SERVICE

I, Clint Miller, a member of the Bar of the Supreme Court of the United States and counsel of record for respondent herein, hereby certify that on October 17, 1994, pursuant to the Rules of the Supreme Court, I served one copy of the attached Brief for Respondent in Opposition to Petition for Writ of Certiorari on the petitioner herein as follows:

By mailing one copy in a duly addressed envelope, with first class postage prepaid to:

JOHN WESLEY HALL, JR.
(Craig Lambert)
523 West Third St.
Little Rock, AR 72201

All parties required to be served have been served.

DATED: October 17, 1994

Respectfully submitted,

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NOV 2 3 PAGE 11

No. 94-5707

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October Term, 1994

SHARLENE WILSON,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

REPLY BRIEF OF PETITIONER ON PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

JOHN WESLEY HALL, JR.
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Attorney for Petitioner

October 26, 1994

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12 PP

QUESTION PRESENTED FOR REVIEW

Whether the "knock and announce" rule of the common law is constitutionally mandated under the Fourth Amendment.

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In The
Supreme Court of the United States
October Term, 1994

SHARLENE WILSON,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

REPLY BRIEF OF PETITIONER ON PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE "KNOCK AND ANNOUNCE" RULE OF THE COMMON LAW IS A REQUIREMENT OF THE FOURTH AMENDMENT.

A.

The State's argument essentially is that (1) the "knock and announce" requirement is somehow not constitutionally required because of all its exceptions, and (2) petitioner's comment about the number of firearms in this country only underscores the need for

exceptions for destruction of evidence and risk of violence as permitting an announced entry.

As petitioner stated in her brief, the exceptions to "knock and announce" are not before the court; the only question is whether the common law requirement of *Semayne's Case*, 5 Co.Rep. 91a, 77 Eng.Rep. 194 (1603), must be read into the Fourth Amendment. We agreed in the petition that there are valid and important exceptions to the constitutional requirement of "knock and announce" that would still likely be the law. Pet. Cert. at 12-13 & n. 6. In this case we do not expect a code of "knock and announce"; that is not this Court's function. That will have to be developed on a case-by-case basis, and the substantial body of law on the exceptions already discussed in the Petition for Certiorari will certainly be "reasonable" under the Fourth Amendment. So, the State's argument misses the mark.

In this case, no exception was asserted in the trial court or the Arkansas Supreme Court because the State relied on Ark.R.Crim.P. 13.3 which does not even mention "knock and announce."

B.

We agree that the element of surprise in some searches can be imperative, *if*, and this is a BIG if, the police can show a valid reason to overcome the privacy and property interests of the householder they intend to invade with battering rams, guns drawn and cocked, and stun grenades. That is what the current exceptions are for. Both sides cite Miss.Code Ann. § 41-29-157(c) that the rules are different in drug cases. We cite

numerous statutes in note 11 to the Petition permitting "no knock" warrants in drug cases. *See also State v. Stevens*, 181 Wis.2d 410, 511 N.W.2d 591, 594-95 (1994) (drug cases are *per se* exigent circumstances for an exception to "knock and announce"). Such a per se rule, however, may be too broad, and that can be dealt with under the exceptions and how the Court approaches this case if it grants certiorari.

The element of surprise, however, is subject to great abuse and greater danger to citizens *and* police. The anecdotal evidence is mounting. Ironically, the December 1994 PLAYBOY magazine on newsstands the week this reply brief is filed provides a parade of horribles of citizens and police shot and killed or seriously wounded during raids by overzealous police officers. James Bovard, *Oops—You're Dead; The Body Count From No-Knock Drug Raids is Climbing. Are You Next?*, PLAYBOY 50-51 (Dec.1994), in the Appendix at A-1. Police officers and citizens are dying because the police generally have such a cavalier attitude toward the privacy of the home that is so paramount in American jurisprudence. *Payton v. New York*, 445 U.S. 573, 591 & n.33 (1980); *Steagald v. United States*, 451 U.S. 204, 217 (1981). This case could provide the impetus to but the brakes on and look anew at what is becoming a growing problem.

When *Semayne's Case* was decided in 1603, firearms had not yet even been invented. Yet, the requirement of "knock and announce" to prevent violence against the officers and homeowner was significant enough then to be a part of the common law. So, how far have we come? Yes, there is danger in announcement. There can be greater danger in *not* announcing. In drug cases, would not a holder of a cache of drugs and drug

money fear robbery more than the police? At least the police will not kill them to take their drugs and money. Also, when the house is surrounded, where will the suspect go? If the officers really feel threatened by violence, they can tear gas the house and end it all without bloodshed.

CONCLUSION

The issue is significant and ripe for decision. The petition for writ of certiorari should be granted.

Respectfully submitted,

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October 26, 1994

Attorney for Petitioner

OOPS— YOU'RE DEAD

the body count from no-knock drug raids is climbing. are you next?

By JAMES BOVARD

On March 25 of this year, 13 heavily armed Boston police wearing fatigue outfits smashed into the apartment of a 75-year-old retired minister, the Reverend Accelynne Williams. Williams ran into his bedroom when the raid began, but police smashed down the bedroom door, shoved Williams to the floor and handcuffed him. Williams may have had up to a dozen guns pointed at his head during the scuffle. Minutes later, Williams died of a heart attack. No drugs or guns were found in Williams' apartment. The police had carried out the raid based on a tip from an unidentified informant who said that there were guns and drugs in the building but did not give a specific apartment number. A policewoman simply took the informant's word, did a quick drive-by of the building, got a search warrant and then gave the go-ahead to her fellow officers to charge. An editorial in *The Boston Globe* later observed, "The Williams tragedy resulted, in part, from the 'big score' mentality of the centralized Boston Police Drug Control Unit. Officers were pumped up to seize machine guns in addition to large quantities of cocaine and a 'crazy amount of weed,' in the words of the informant."

The Boston police commissioner apologized.

The press coverage made the event look like an isolated tragedy in the war on drugs. It was not.

No-knock police raids destroy Americans' right to privacy and safety. People's lives are being ruined or ended as a result of unsubstantiated assertions by anonymous government informants.

As early as 1603, English courts recognized that law officers were obliged to knock and announce their purpose before entering a citizen's home. Early American courts, such as the New York Supreme Court in 1813, adopted similar requirements.

Unfortunately, contemporary law enforcement practice does not reflect the patience or respect for individual rights that the founding fathers had. Police do not keep statistics on warrants served at the wrong address or of the innocent bystanders killed or maimed in the war on drugs. But a search of newspaper files turns up a litany of law enforcement agencies gone berserk.

At two A.M. on January 25, 1993, police smashed down the door and rushed into the home of Manuel Ramirez, a retired golf course groundskeeper living in Stockton, California. Ramirez awoke, grabbed a pistol and shot and killed one policeman before other officers killed him. The police were raiding the house based on a tip that drugs were on the premises, but they found no drugs.

County Sheriff's Lieutenant Dan Lewis later tried to justify the raid's methods: "Our problem is that a lot of times we're dealing with drug dealers, and their thought processes are not always right from the start. That's when things get real dangerous for us."

Police told reporters the next day that, though the drug raid was a complete failure, they did find $8500 in cash—much of it in $50 and $100 bills, which the police asserted was consistent with drug dealers' cash-handling methods. Maria Ramirez, Manuel's daughter, said that the money was from the family business of selling jewelry at flea markets. She had receipts to prove it.

•

On August 25, 1992, officials from the U.S. Customs Service and the DEA, along with local police, raided the San Diego home of businessman Donald Carlson, setting off a bomb in his backyard (to disorient Carlson), smashing through his front door and shooting him three times after he tried to defend himself with a gun. Police even shot Carlson in the back after he had given up his gun and was lying wounded on his bedroom floor. Amazingly, Carlson survived the raid.

The Customs Service mistakenly believed that there were four machine guns and a cache of narcotics in Carlson's home. Carlson related in congressional testimony in 1993 that even after agents failed to find any drugs, "No one offered me medical assistance while I lay on the floor of my bedroom. Eventually, paramedics arrived and took me to the hospital. I was shackled and kept in custody under armed guard for several days at the hospital.

During that time, I was aware of hospital personnel referring to me as a criminal and of police officers and agents coming into my room."

The raid was based on a tip from a paid informant named Ron, who later told the *Los Angeles Times* that he had never formally identified a specific house to be searched.

Customs officials had Carlson's home under surveillance for many hours before they launched the raid. The agents could easily have arrested Carlson when he arrived home at ten P.M. but instead watched and waited to attack until after midnight, when

Carlson was asleep, in order to maximize the surprise. Although they had a search warrant based on the house being a drug storehouse, agents carried out the raid even after it became obvious that Carlson was living a normal life there.

The government finally admitted limited liability for Carlson's medical costs in March 1994, but the chief federal prosecutor, Alan Bersin, simultaneously hailed the "courageous law enforcement efforts in the area of drug interdiction" involved in the case. "The tragedy for everyone involved is that no one acted other than in good faith," Bersin asserted. "We were deceived by our informant and must accept responsibility for that."

Bersin's statement implies that when federal agents launch a raid on someone's home based solely on an allegation by a government informant, a "tragedy" occurs only when the informant deceives the agents. The Justice Department has indicated that no federal agents will be prosecuted for their actions before, during or after the raid.

In March 1992 a police SWAT team in Everett, Washington killed Robin Pratt in a no-knock raid while carrying out an arrest warrant for her husband. (Her husband was later released after the allegations on which the arrest warrant was based turned out to be false.) *The Seattle Times* summarized the raid:

"Instead of using an apartment key given to them, SWAT members threw a 50-pound battering ram through a sliding-glass door that landed near the heads of Pratt's six-year-old daughter and five-year-old niece. As deputy Anthony Aston rounded the corner to the Pratts' bedroom, he encountered Robin Pratt. SWAT members were yelling, 'Get down,' and she started to crouch to her knees. She looked up at Aston and said, 'Please don't hurt my children.' Aston had his gun pointed at her and fired, shooting her in the neck. According to attorney John Muenster, she was alive another one to two minutes but could not speak because her throat had been destroyed by the bullet. She was then handcuffed, lying facedown."

In 1991 Garland, Texas police dressed in black and wearing ski masks burst into a mobile home, waving guns. They kicked down the door of a bedroom that Kenneth Baulch shared with his 17-month-old son. The police found Baulch holding an object in his hand. A policeman shot and killed Baulch. The object turned out to be an ashtray. The police say Baulch was advancing on them. The subsequent lawsuit contends he was shot in the back.

In 1989 Titusville, Florida policemen conducted a nighttime no-knock drug raid on the home of a 58-year-old painter, Charles DiGristine. The raid began as the police set off a concussion grenade and smashed through DiGristine's front door. When DiGristine's wife screamed, he hurried to his bedroom to get a pistol. A policeman dressed in dark clothing and a black mask crashed into his bedroom, gunfire was exchanged and the officer was killed. The local government prosecuted DiGristine for first-degree murder, but a jury acquitted him. (The police believed—based on bogus information from an anonymous informant—that the DiGristine home was a center for heavily armed drug dealers. The only drug they found in the raid was a small amount of marijuana owned by DiGristine's 16-year-old son.)

DEA agents used an ax to break down the door of an innocent man's home in Guthrie, Oklahoma in 1991 and then handcuffed and kicked the man in front of his wife and daughters before the agents realized they were at the wrong address. They left without apologizing.

Unfortunately, no-knock raids are becoming more common as federal, state and local politicians and law enforcement agencies decide that the war on drugs justifies nullifying the Fourth Amendment. As Charles Patrick Garcia noted in a 1993 *Columbia Law Review* article, "Seven states, favoring strong law enforcement, have chosen a 'blanket approach,' which holds that once police have established probable cause to search a home for drugs, they are not required to follow the constitutional knock-and-announce requirement."

Even liberal states are jumping on the no-knock bandwagon. The Wisconsin Supreme Court ruled in February that police could forcibly enter a home without knocking in any case in which there was "evidence of drug dealing." Unfortunately, "evidence of drug dealing" can be the uncorroborated assertion of a single anonymous paid government informant. The Wisconsin court said that the "possibility for violence" can be minimized by allowing police to rely on "unannounced, dynamic entry"—though it's a good bet that the judges don't expect police to carry out such raids in the judges' neighborhoods.

Even in states where search warrants require a knock on the door before entry, police routinely disregard that formality. In a 1991 corruption trial, a former Los Angeles policeman testified that the accused officers falsely reported that they had complied with the knock-and-announce rule. In reality they violated the rule in 97 percent of the search warrants they executed.

No-knock raids in response to alleged narcotics violations presume that the government should have practically unlimited power to endanger some people's lives in order to control what others ingest. The right to batter down a door apparently includes the right to kill any citizen who tries to stop the police from forcibly entering his or her home.

The ACLU and the National Rifle Association have jointly called for President Clinton to appoint a commission to investigate "lawlessness in law enforcement." Better yet, Congress should establish explicit rules to limit the arbitrary and violent behavior of federal agents carrying out searches and raids, and state legislatures should repeal their laws granting unlimited no-knock-search powers to police in their jurisdictions.

James Bovard is author of "Lost Rights: The Destruction of American Liberty."

No. 94-5707

In The
Supreme Court of the United States
October Term, 1994

SHARLENE WILSON,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

AFFIDAVIT OF MAILING

I, John Wesley Hall, Jr., counsel for petitioner, swear under penalty of perjury that I mailed 11 copies of the Reply to the Brief in Opposition to the Clerk of the U.S. Supreme Court this 26th day of October, 1994.

Respectfully submitted,

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No. 94-5707

In The
Supreme Court of the United States
October Term, 1994

SHARLENE WILSON,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

CERTIFICATE OF SERVICE

I, John Wesley Hall, Jr., counsel for petitioner, certify that I served a copy of the Reply to the Brief in Opposition on Clint Miller, Deputy Attorney General, 323 Center Street, Suite 200, Little Rock, Arkansas 72201, this 26th day of October, 1994 by first class mail or personal service.

Respectfully submitted,

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No. 94-5707

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SHARLENE WILSON,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

On Writ of Certiorari to the Supreme Court of Arkansas

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 28, 1994
CERTIORARI GRANTED NOVEMBER 28, 1994

81 pp

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IN THE CIRCUIT COURT
OF HOT SPRING COUNTY, ARKANSAS

No. CR 93-1-1

STATE OF ARKANSAS

v.

SHARLENE WILSON and BRYSON JACOBS

DOCKET ENTRIES

(NOTE: Docket entries for co-defendant Bryson Jacobs are generally omitted.)

Delivery of a Controlled Substance, A.C.A. 5-64-401, Two Counts, Class Y & C Felonies

DATE	PROCEEDINGS
12-31-92	Information filed, bench warrant issued and given to Henry Efird, Arraignment for Jan. 11, 1993, 9 A.M.
1-11-93	R. Jeffrey—NG—Bond set as $100,000 on each offense—to be set on request
5-29-93	Amended Information w/affidavit
6-11-93	Notice of Substitution of Counsel
6-29-93	Order Substituting Counsel
7-13-93	Jury Trial for Bryson Jacobs—recessed to July 14
7-14-93	Trial resumed—both parties rests—jury verdict of guilty of all charges—sentenced per verdicts
7-22-93	Wilson's Motion to Suppress Search and Seizure

DATE	PROCEEDINGS
10-1-93	Speedy trial time waived until re-set according to docket availability—bond hearing with J.W. Hall representing—bond set at $100,000
11-1-93	Jury trial for Sharlene Wilson—J.W. Hall Defense Attorney—After motion hearing jury selected—opening statement—state's evidence—recessed to 11-4-93 at 9 A.M.
11-4-93	Trial resumed with evidence of state—state rests—evidence for defense—defense rests—instructions—argument—deliberation—
	Not Guilty of Marijuana on 12-20-92
	Not Guilty of Meth on 12-21-92
	Guilty of Delivery of Meth on 11-23-92 + 25 yrs
	Guilty of Delivery of Marijuana on 11-22-92 + 6 yrs
	Guilty of Poss of Marijuana on 12-31-92 + 1 yr in county jail + $1,000
	Guilty of Poss of Drug Para. + $10,000 fine
	Credit for jail time—immediate commitment
	Declared an indigent for appeal—sentence consecutive—appeal bond $100,000
	Committment
11-16-93	Notice of Appeal + Designation of Record
1-10-94	Order filed (granting Def. indigent status for appeal)

No. CR-93-63-1

Possession of a Controlled Substance with Intent to Deliver. A.C.A. 5-64-401, 2 Counts, Class Y, [Jacobs: Felon in Possession of Firearm, A.C.A. 5-73-103, Class D Felony]

DATE	PROCEEDINGS
4-7-93	Information filed, bench warrant issued, notice of arraignment for 4-12-93
4-12-93	Bench warrant returned, Wilson
4-12-93	Both plead NG
5-28-93	Amended information w/affidavit
11-3-93	Jury trial—see entry in CR93-1-1—(Wilson) Commitment
11-16-93	Notice of appeal and designation of record
1-10-94	Order filed (granting indigent stauts for Def. for appeal)

No. CR-93-68-1

1) Delivery of Controlled Substances

2) Terroristic Threatening First Degree

DATE	PROCEEDINGS
2-16-93	Information w/affidavit filed; Bench Warrant Issued and Given to Henry Efird; Notice of Arraignment issued setting arraign. on Mar. 8, 1994 @ 9 A.M.
4-13-93	Bench warrant returned
7-22-93	Motion to suppress search + seizure
10-1-93	Bond hearing—set at $100,000—speedy trial time waived from continuance—Sept. to new trial date—Mr. Hall to provide available dates and court will set
9-29-93	Set for Oct. 28, 1993 9 A.M.—Jury
10-8-93	Reset for Nov. 3, 1993 9 A.M. Jury
11-3-93	Jury trial—see docket entry in CR 93-1-1
11-8-93	Judgment
11-16-93	Notice of Appeal and Designation of Record
1-10-94	Order filed (granting indigent stauts for Def. for appeal)

CHRONOLOGY OF PROCEEDINGS IN ARKANSAS SUPREME COURT

CR 94-160

Transcript filed, February 14, 1994

Appellant Wilson's Brief filed,

Appellee's Brief filed,

Opinion of Arkansas Supreme Court, July 11, 1994

[Filed Dec. 31, 1992]

IN THE CIRCUIT COURT OF HOT SPRING COUNTY, ARKANSAS

No. CR-93-11-1

STATE OF ARKANSAS

vs.

SHARLENE WILSON, BRYSON JACOBS

INFORMATION WITH AFFIDAVIT

Delivery of a Controlled Substance, Two Counts
One Class Y Felony and One Class C Felony
A.C.A. 5-64-401

I, DAN HARMON, PROSECUTING ATTORNEY WITHIN AND FOR THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF ARKANSAS, of which Hot Spring County is a part, in the name and by the authority of the State of Arkansas, do hereby charge SHARLENE WILSON AND BRYSON JACOBS with the crimes of DELIVERY OF A CONROLLED SUBSTANCE, METHAMPHETAMINE, a Schedule I controlled substance, A.C.A. 5-64-401, CLASS Y FELONY and DELIVERY OF A CONTROLLED SUBSTANCE, MARIJUANA, a Schedule VI controlled substance, A.C.A. 5-6-401, CLASS C FELONY, committed as follows to wit:

COUNT ONE

The said defendants on or about November 22, 1992 in Hot Spring County, Arkansas unlawfully and feloniously delivered a controlled substance, that being a quantity of

marijuana, a Schedule VI controlled substance, to a confidential informant working for the Seventh Judicial District Drug Task Force in exchange for $70.00, see attached affidavit, against the peace and dignity of the State of Arkansas.

COUNT TWO

The said defendants on or about November 23, 1992 in Saline County, Arkansas unlawfully and feloniously delivered a controlled substance, that being a quantity of methamphetamine, a Schedule I controlled substance, to a confidential informant working for the Seventh Judicial District Drug Task Force in exchange for $100.00, see attached affidavit, against the peace and dignity of the State of Arkansas.

The defendant, Bryson Jacobs has previously been convicted of more than one but less than four felonies and his sentence should be enhanced in accordance with A.C.A. 5-4-501.

DAN HARMON
Prosecuting Attorney

By: /s/ Dan Harmon
Deputy Prosecuting Attorney

I, Judy W. Rudd, state on oath that the above and foregoing statements are true and correct to the best of my knowledge, information and belief.

/s/ Dan Harmon

I, hereby find that this sworn affidavit (attached) demonstrates reasonable and probable cause for the issuance of a warrant of arrest for the above-named individual(s) for the above-stated offense(s).

/s/ John W. Cole
Magistrate

AFFIDAVIT

Facts and Evidence Alleging Probable Cause

Comes now John Garner of the Seventh Judicial District Drug Task Force and on oath swears and affirms that to the best of his knowledge and belief the following facts and evidence exist to believe that Sharlene Wilson W/F and Bryson Jacobs W/M violated the criminal laws of the State of Arkansas.

My name is John Garner and I am a Supervisor with the Seventh Judicial District Drug Task Force. On 11-22-92, at approximately 20:55 hours, an Agent for the Seventh Judicial District Drug Task Force met with a confidential informant in Malvern, AR behind the Malvern Airport. The Agent briefed, searched and equipped the informant with a body mike transmitter. The Agent gave the informant $120.00 with which to purchase narcotics. Prior to the meeting between the Agent and the informant, Bryson Jacobs contacted the informant to arrange a meeting for the sale of marijuana. The Agent followed the informant to 534 Oaklawn Street in Malvern, AR, the residence of Sharlene Wilson and Bryson Jacobs. The Agent observed the informant enter the residence at approximately 21:10 hours and monitored and recorded the conversation between the informant, Sharlene Wilson and Bryson Jacobs. The Agent heard the informant purchase a half ounce of marijuana for $70.00 and Bryson Jacobs make change for the informant. The Agent followed the informant to a prearranged location where the informant gave the Agent the evidence and the remainder of the money ($50.00). The Agent retained the evidence in his possession and turned it over to me for lab submission.

On 11-23-92, at approximately 20:10 hours, an Agent for the Seventh Judicial District Drug Task Force met with a confidential informant in Malvern, AR. The Agent briefed, searched and equipped the informant with a body

mike transmitter. The Agent gave the informant $100.00 with which to purchase narcotics. Prior to the meeting between the Agent and the informant, Bryson Jacobs contacted the informant to arrange a meeting for the sale of methamphetamine. The Agent followed the informant to 534 Oaklawn Street in Malvern, AR, the residence to Sharlene Wilson and Bryson Jacobs. The Agent observed the informant enter the residence at approximately 20:20 hours and monitored and recorded the conversation between the informant, Sharlene Wilson and Bryson Jacobs. Bryson Jacobs informed the informant of the quality of the methamphetamine. The Informant purchased four triangular, heat-sealed plastic packets of suspected methamphetamine for $100.00. The informant gave the Agent the evidence. The Agent retained the evidence in his possession and turned it over to me for lab submission.

Defendant Bryson Jacobs has previously been convicted for Arson and Firebombing in New Mexico.

/s/ John Garner
JOHN GARNER
Drug Task Force

* * * *

[Subscription paragraph omitted.]

[Note: This document was omitted from transcript.]

[Filed May 28, 1993]

IN THE CIRCUIT COURT
OF HOT SPRING COUNTY, ARKANSAS

(Title Omitted in Printing)

AMENDED INFORMATION WITH AFFIDAVIT

Information for Delivery of a Controlled Substance A.C.A. 5-64-401
Two Counts Class Y Felony Class C Felony

---

* * * *

[Amendment:]

The State of Arkansas also charges SHARLENE WILSON as an HABITUAL OFFENDER, A.C.A. 5-4-501, having been previously been convicted or found guilty of more than one (1) but less than four (4) felonies.

* * * *

[Affidavit the same]

[Filed May 28, 1993]

IN THE CIRCUIT COURT
OF HOT SPRING COUNTY, ARKANSAS

(Title Omitted in Printing)

AMENDED INFORMATION WITH AFFIDAVIT

Information for Possession of a Controlled Substance with Intent to Deliver A.C.A. 5-64-401 Two Counts Class Y Felony Class C Felony Possession of Drug Paraphernalia A.C.A. 5-64-403 Class C Felony Felon in Possession of a Firearm A.C.A. 5-73-103 Class D Felony

I, DAN HARMON, PROSECUTING ATTORNEY WITHIN AND FOR THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF ARKANSAS, of which HOT SPRING COUNTY is a part, in the name and by the authority of the State of Arkansas, do hereby amend the information and charge SHARLENE WILSON and BRYSON JACOBS with POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER, A.C.A. 5-64-401 (METHAMPHETAMINE AND HYDROMORPHONE), CLASS Y FELONY; POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER, A.C.A. 5-64-401 (MARIJUANA), CLASS C FELONY; POSSESSION OF PARAPHERNALIA, A.C.A. 5-64-403, CLSS C FELONY and charge BRYSON JACOBS with FELON IN POSSESSION OF A FIREARM, A.C.A. 5-73-103, CLASS D FELONY and also charge SHARLENE WILSON as an HABITUAL OFFENDER, A.C.A. 5-4-501, committed as follows, together wit:

COUNT ONE: The said defendants on or about 12-31-93 in Hot Spring County, Arkansas unlawfully and feloniously possessed controlled substances, that being methamphetamine and hydromorphone, Schedule II controlled substances, with the intent to deliver, against the peace and dignity of the State of Arkansas, see attached affidavit.

COUNT TWO: The said defendants on or about 12-31-93 in Hot Spring County, Arkansas unlawfully and feloniously possessed a controlled substance, that being a quantity of marijuana, a Schedule VI controlled substance, with the intent to deliver, against the peace and dignity of the State of Arkansas, see attached affidavit.

COUNT THREE: The said defendants on or about 12-31-93 in Hot Spring County, Arkansas unlawfully and feloniously possessed drug paraphernalia, that being syringes, forceps, and other items, against the peace and dignity of the State of Arkansas, see attached affidavit.

COUNT FOUR: The said defendant, Bryson Jacobs, on or about 12-31-93 in Hot Spring County, Arkansas unlawfully and feloniously possessed firearms after previously having been convicted of a felony, against the peace and dignity of the State of Arkansas, see attached affidavit.

The State of Arkansas also charges SHARLENE WILSON as an HABITUAL OFFENDER, A.C.A. 5-4-501, having been previously been convicted or found guilty of more than one (1) but less than four (4) felonies.

* * * *

[Jurat, oath, certificate of service omitted]

AFFIDAVIT

The affiant, John Garner, being first duly sworn, states as follows:

My name is John Garner and I am a Supervisor with the Seventh Judicial District Drug Task Force. On 12-31-92, Agents for the Drug Task Force executed a Search/Seizure Warrant at 534 Oaklawn Street, Malvern, Hot Spring County, Ar., the residence of Sherlene Wilson, W/F, and Bryson Jacobs, W/M. Both subjects were present at the residence at the time the warrant was served. During the search, numerous items were seized, including, suspected methamphetamine, suspected marijuana, yellow tablets of an unknown nature, but suspected as a controlled substance, several firearms, and items of drug paraphernalia, i.e. drug records, syringes, forceps, etc. Both Wilson and Jacobs were arrested on warrants. The seized evidence was either stored or transported to the State Crime Lab for analysis.

The above statements are true and correct to the best of my knowledge, information and belief.

[Jurat and oath omitted]

[Filed May 28, 1993]

AMENDED INFORMATION WITH AFFIDAVIT

IN THE CIRCUIT COURT
OF HOT SPRING COUNTY, ARKANSAS

No. CR 93-68-1

THE STATE OF ARKANSAS

vs.

SHARLENE WILSON

Information for Delivery of Controlled Substance A.C.A. 5-64-401 Class C Felony Terroristic Threatening First Degree A.C.A. 5-13-301 Habitual Offender A.C.A. 5-4-501

I, DAN HARMON, PROSECUTING ATTORNEY WITHIN AND FOR THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF ARKANSAS, of which HOT SPRING COUNTY is a part, in the name and by the authority of the State of Arkansas, do hereby amend the information and charge SHARLENE WILSON with DELIVERY OF A CONTROLLED SUBSTANCE, A.C.A. 5-64-401 (MARIJUANA), CLASS C FELONY; TERRORISTIC THREATENING FIRST DEGREE, A.C.A. 5-13-301, CLASS D FELONY, and as an HABITUAL OFFENDER, A.C.A. 5-4-501, committed as follows, together wit:

COUNT ONE: The said defendant on or about 12-30-93 in Hot Spring County, Arkansas unlawfully and feloniously delivered a controlled substance, that being marijuana, to a confidential informant of the Seventh Judicial District Drug Task Force in exchange for $35.00, against the peace and dignity of the State of Arkansas, see attached affidavit.

COUNT TWO: The said defendant on or about 12-30-93 in Hot Spring County, Arkansas unlawfully and feloniously with the intent of terrorizing another person, threatened to cause serious physical injury or death to a confidential informant of the Seventh Judicial District Drug Task Force, against the peace and dignity of the State of Arkansas, see attached affidavit.

The State of Arkansas also charges SHARLENE WILSON as an HABITUAL OFFENDER, A.C.A. 5-4-501, having been previously been convicted or found guilty of more than one (1) but less than four (4) felonies.

* * * *

[Jurat, oath, certificate of service omitted]

AFFIDAVIT

The affiant, John Garner, being first duly sworn, states as follows:

My name is John Garner and I am a Supervisor with the Seventh Judicial District Drug Task Force. On 12-30-92, at approx 1930 hrs., Agents for the Drug Task Force met with a Confidential Informant at the Hot Spring County Courthouse. The C/I made a telephone call to 332-8733, the residence of Sherline Wilson, W/F, DOB, 12-27-56, at 534 Oaklawn Street, Malvern, Ar., to inquire about buying some narcotics. A white male, identified as Bryson Jacobs, DOB, 9-12-44, also a resident of the address, answered the telephone. The C/I asked him if he had any narcotics to sell and he said he did, but Sherline would be back in ten (10) minutes, and to call back.

At approx 1955 hrs., the C/I called back and Sherline Wilson answered the phone. The C/I asked if she had any narcotics to sell and she (Wilson) told the C/I that she had marijuana. The C/I ordered a quarter ounce and Wilson told C/I to meet her at the Country Mart Store, on East Page Street, in five (5) minutes.

The C/I was searched and given $40.00, and surveillance was established as the C/I drove to the meeting place. Agents observed Sherline Wilson driving a 1992 Nissen pick up truck, gray in color, baring Ar LPN TZP 615, which lists to her, meet with the C/I, at approx 2005 hrs. The C/I got into Wilson's vehicle and, at this point, Wilson asked the C/I if she was working for the cops. The C/I said that she was not and Wilson threatened the C/I with serious physical injury if she (Wilson) found out that she was. Wilson made the C/I lift her shirt to check for surveillance equipment. The C/I then handed Wilson $40.00 for a quarter ounce of marijuana and Wilson said that the price was $35.00 and they would have to go get change. Wilson insisted that the C/I ride with her to a nearby store to get change and en route

showed the C/I a small, chrome plated, semi automatic pistol and again threatened the C/I with serious physical injury or death, if she (C/I) was working for the police. Once the change was obtained, Wilson handed the C/I a plastic bag containing green, vegetable material and $5.00. Wilson returned the C/I to her vehicle and left the area.

The C/I met Agents immediately after leaving Wilson's presence, and handed them a plastic bag containing green, vegetable material represented to be marijuana, and $5.00 change. The Agent retained the evidence and turned it over to affiant for lab submission.

The above statements are true and correct to the best of my knowledge, information and belief.

* * * *

[Jurat and oath omitted]

[Filed July 22, 1993]

IN THE CIRCUIT COURT
OF HOT SPRING COUNTY, ARKANSAS

Nos. CR93-1, CR93-63, CR93-68

STATE OF ARKANSAS

vs.

SHARLENE WILSON

MOTION TO SUPPRESS SEARCH AND SEIZURE

Defendant moves to suppress the search and seizure of her premises conducted on December 31, 1992 as in violation of the Fourth Amendment to the U.S. Constitution, Art. 2 § 15 of the Arkansas Constitution, and the Arkansas Rules of Criminal Procedure under the following grounds:

1. The affidavit in application for the warrant contains stale information since it relates to an alleged buy occurring one month earlier.

2. The affidavit fails to demonstrate a sufficient nexus between the alleged buy and the fact to be inferred; i.e., that contraband will be on the premises to be searched.

3. The affidavit is based on hearsay, and it fails to disclose the extent of the hearsay or why it is trustworthy. A.R.Crim.P. 13.1(b).

4. There was no valid search warrant in existence at the time of the search of the premises.

5. A copy of the warrant was not served on defendant prior to the search. A.R.Crim.P. 13.3(b).

6. The affidavit for the search warrant was not sworn to before the issuing judicial officer. A.R.Crim.P. 13.1(b).

7. A proper receipt or inventory was not prepared and provided to defendant. A.R.Crim.P. 13.3(d).

8. The executed warrant was not returned to the incurring judicial officer "together with a verified report of the facts and circumstances of execution, including a list of things seized." A.R.Crim.P. 13.4(b).

WHEREFORE, the motion to suppress should be granted.

* * * *

[Jurat and certificate of service omitted]

VERDICT FORM
(CR 93.1-1)

We, the Jury, find SHARLENE WILSON guilty of Delivery of Marijuana on November 22, 1992.

[Signature omitted]

VERDICT FORM—HABITUAL OFFENDER—
STATUS UNDISPUTED

We, the Jury, fix the sentence of SHARLENE WILSON for the offense of Delivery of Marijuana on November 22, 1992 at:

(A) A term of 6 years (not less than six (6) years nor more than twenty (20) years) in the Arkansas Department of Correction; OR

(B) A fine of (not to exceed $10,000.00) dollars; OR

(C) Both a term of (not less than six (6) years nor more than twenty (20) years) in the Arkansas Department of Correction and a fine of (not to exceed $10,000.00) dollars.

[Signature omitted]

VERDICT FORM
(CR 93-1-1)

We, the Jury, find SHARLENE WILSON guilty of Delivery of Methamphetamine on November 23, 1992.

[Signature omitted]

VERDICT FORM—HABITUAL OFFENDER—
STATUS UNDISPUTED

We, the Jury, fix the sentence of SHARLENE WILSON for the offense of Delivery of Methamphetamine on November 23, 1992 at:

A term of 25 years (not less than twenty (20) years nor more than sixty (60) years or life) in the Arkansas Department of Correction.

[Signature omitted]

VERDICT FORM
(CR 93-63-1)

We, the Jury, find SHARLENE WILSON not guilty of a methamphetamine related offense on December 31, 1992.

[Signature omitted]

VERDICT FORM
(CR 93-63-1)

We, the Jury, find SHARLENE WILSON guilty of Possession of Marijuana on December 31, 1992.

[Signature omitted]

VERDICT FORM—HABITUAL OFFENDER—
STATUS UNDISPUTED

We, the Jury, fix the sentence of SHARLENE WILSON for the offense of Possession of Marijuana on December 31, 1992, at:

(A) A term of (not more than one (1) year) in the County Jail; OR

(B) A fine of (not to exceed $1,000.00) dollars; OR

(C) Both a term of 1 year (not more than one (1) year) in the County Jail and a fine of $1,000.00 (not to exceed $1,000.00) dollars.

[Signature omitted]

VERDICT FORM
(CR 93-63-1)

We, the Jury, find SHARLENE WILSON guily of Possession of drug Paraphernalia.

[Signature omitted]

VERDICT FORM—HABITUAL OFFENDER—
STATUS UNDISPUTED

We, the Jury, fix the sentence of SHARLENE WILSON for the offense of Possession of Drug Pharaphernalia at:

(A) A term of (not less than six (6) years nor more than twenty (20) years) in the Arkansas Department of Correction; OR

(B) A fine of $10,000.00 (not to exceed $10,000.00) dollars; OR

(C) Both a term of (not less than six (6) years nor more than twenty (20) years) in the Arkansas Department of Correction and a fine of (not to exceed $10,000.00) dollars.

[Signature omitted]

VERDICT FORM
(CR 93-68-1)

We, the Jury, find SHARLENE WILSON not guilty of a marijuana related offense on December 30, 1992.

[Signature omitted]

[Filed Nov. 8, 1993]

IN THE CIRCUIT COURT
OF HOT SPRING COUNTY, ARKANSAS

Case No. CR 93-1-1
93-63-1
93-68-1

STATE OF ARKANSAS

vs.

SHARLENE WILSON, a/k/a Sharlene Dunn
a/k/a Sharlene Cate, a/k/a Sharlene Lawrence,
a/k/a Sheri Cate,
Defendant

JUDGMENT

On November 4, 1993, comes the State of Arkansas by DAN HARMON, Prosecuting Attorney for the Seventh Judicial District, and comes the Defendant in person and by her attorney, John Wesley Hall; and the Defendant having been called to the bar of the Court and entered her plea of not guilty thereto, parties announce ready for trial, thereupon come twelve (12) qualified electors of Hot Spring County, Arkansas, who are empaneled and sworn as a Trial Jury in this case, and after hearing the testimony of the witnesses, the instructions of the Court and the argument of Counsel, the Jury doth retire to consider arriving at a verdict and after due deliberation thereon, doth return into open Court with the following verdict:

In Case No. CR93-1-1, "We, the Jury, find the defendant, SHARLENE WILSON, guilty of Delivery of Marijuana, and fix her punishment at a sentence of Six (6) years in the Arkansas Department of Corrections, and We, the Jury, find the defendant, SHALENE WILSON, guilty of Delivery of Methamphetamine, and fix her punishment at a sentence of Twenty-five (25) years in the Arkansas Department of Corrections."

In Case No. CR 93-63-1, "We, the Jury, find the defendant, SHARLENE WILSON, guilty of Possession of Drug Paraphernalia, and fix her punishment at a fine of $10,000.00."

"We, the Jury, find the defendant, SHARLENE WILSON, guilty of Possession of Marijuana, and fix her punishment at a sentence of One (1) year in the Hot Spring County Jail and a fine of $1,000.00."

"We, the Jury, find the defendant, SHARLENE WILSON, not guilty of Possession of Methamphetamine with the Intent to Deliver."

In Case No. CR 93-68-1, "We, the Jury, find the defendant, SHARLENE WILSON, not guilty of Delivery of Marijuana."

Whereupon the Court doth discharge the Jury from this case, and the Court doth ask the Defendant if there is any legal reason why Judgment should not be entered at this time, and the Defendant replying in the negative, the Court doth this day sentence the Defendant to:

1.) One (1) year in the Hot Spring County Jail and a fine of $1,000.00 for Possession of Marijuana in Case No. CR 93-63-1, the defendant is to be given credit for the time already served in the Hot Spring County Jail.

2.) Twenty-five (25) years in the Arkansas Department of Corrections for Delivery of Methamphetamine in Case No. CR 93-1-1.

3.) Six (6) years in the Arkansas Department of Corrections for Delivery of Marijuana in Case No. CR 93-1-1.

4.) A $10,000.00 fine for Possession of Drug Paraphernalia in Case No. CR 93-63-1.

Defendant is advised of her right to appeal to the Arkansas Supreme Court and, further, that she has thirty (30) days in which to file a Notice of Appeal. She is also advised that if she is not satisfied with the services of her attorney at trial that she has 30 days to notify the Court in the proper manner or to institute proper filing for ineffective assistance of council within that 30 day time.

This Judgment having been made on November 4, 1993, is entered now for then.

[Signature omitted]

[Filed Nov 16, 1993]

IN THE CIRCUIT COURT
OF HOT SPRING COUNTY, ARKANSAS

(Title Omitted in Printing)

NOTICE OF APPEAL AND DESIGNATION OF RECORD

The defendant appeals the judgment of conviction in these cases to the Arkansas Supreme Court. Jurisdiction is based on S.Ct. Rule 1-2(a)(2).

The record on appeal shall consist of all pleadings and papers in the clerk's file (except subpoenas and jury related documents), the testimony of any hearings in the case for bond revocation, bond setting, motions to dismiss or suppress, and the trial. The record of testimony is hereby ordered from the Court Reporter (defendant has been previously declared an indigent for appeal).

* * * *

[Signature and certificate of service omitted]

[Filed Jan. 10, 1994]

IN THE CIRCUIT COURT
OF HOT SPRING COUNTY, ARKANSAS

(Title Omitted in Printing)

ORDER

On motion of the defendant, the defendant is hereby declared indigent for the purposes of appeal.

IT IS SO ORDERED.

[Signature omitted]

SUPPRESSION HEARING TRANSCRIPT
(R. 160-199)

THE COURT: I had no knowledge of it, of course. Okay, what else do we have, John?

MR. HALL: Motion to suppress the search, which this deals with 93-63.

I prepared a motion to suppress which I mailed to the Clerk. My client got a copy of it, but apparently it's not in the court file. So, apparently never arrived here and I don't know whether Mr. Harmon got it. Anyway the grounds that I alleged in that, this is only in 93-63, it doesn't pertain to 93-1 or 93-68. For grounds first, because there is a question here of whether or not the warrant was signed before the search (R. 161) occurred. I read the transcript of Jacobs' trial whenever it was and it never was made clear to me whether or not it was, that they may have had the warrant in transit to you to be signed and then executed the search at another time.

THE COURT: In other words, the search was executed before the search warrant was executed.

MR. HALL: Possibly. I'm raising that as a ground that we have to try it because it never was made clear to me at the Jacobs trial and also the testimony of Mr. Efird, I believe, at Bryson Jacobs' February hearing, it left that open as well because he said he did not go to Sheridan to sign it and that's the second grounds. Efird testified in February of '93 at the Jacobs' trial and I'd like to make a copy of that part of the record. I'll get separate copies of that and make it part of the file. I guess we can make it Defendant's Exhibit No. 1 for that hearing.

THE COURT: Any problem with that, Mr. Harmon?

MR. HARMON: No.

THE COURT: I'll allow you to excerpt that and make it an exhibit to this hearing as Defendant's Exhibit No. 1.

(THEREUPON, the item was marked for identification as Defendant's Hearing Exhibit No. 1. [omitted])

MR. HALL: And he testified, I believe, it's been corrected by the record, but he testified, I believe, that he signed the affidavit before a Notary Public and it was taken to the Court to be executed, to be signed off on by the Court and the affidavit for the warrant itself says it was subscribed to before the Court.

MR. HARMON: It was subscribed to before the Court.

THE COURT: So, the question is whether the Court took the affidavit or someone else took the affidavit and it was brought to the Court.

MR. HALL: And there's very confusing times to when the warrant was actually obtained because a charge was filed, a case that became 93-1 when the affidavit was filed with the Court Clerk by Mr. Birch at 4:18 p.m. that day. The search occurred at five o'clock. The exact sequence of events are very unclear and the Bryson Jacobs trial didn't clear it up. His suppression hearing didn't even clear it up. I don't want to make that a part of the record, I don't want to clutter up the record.

Third, three exculpatory things were omitted in the affidavit. I think they're exculpatory. They go to the credibility of the informant. This whole affidavit depends on the informant's credibility. The affidavit as a whole leaves the impression that this informant is a citizen informant. It doesn't tell the Court which was developed by her own testimony at the Jacobs' trial, that she had been arrested and they in effect were rolling her over, she and her husband had been arrested. Their truck had been seized and she became a cooperating person. That was omitted completely from the affidavit. That would go to her credibility, her reason to give up somebody else.

Secondly, it doesn't mention in here that she had been to see the defendant several times to make entreaty to the defendant to get her to deliver something to her. There was testimony at the Jacobs' trial, it was admitted that she made numerous trips over to Sharlene Wilson's house. They varied as to how many. The witness has testified

to it. You may recall. Anyway, she went there several times. The defense of entrapment is one of the delivery, possibly both, depending on what the jury, how it comes out—

And third, it didn't mention that Sharlene Wilson had to leave to get the drugs from somebody else. The drugs weren't on the premises. This is the delivery count that occurred, the methamphetamine delivery that occurred prior to form the basis of the charge of 93-1, I believe.

Count Two in 93-1 talks about delivery of marijuana and methamphetamine on the 22nd and 23rd of November, 1992. That was the basis of the search warrant. This is stuff that happened a month earlier.

MR. HARMON: The basis of the search warrant was the buy that was made the day before.

MR. HALL: That's correct. On December 30th, she met with, Efird met the informant, Efird is the affiant, sent her in, she was not wired because they couldn't put a wire on her so the whole thing turns on the informant's credibility to Efiird and all these things were not pointed out. That's kind of a Frank's challenge, Franks vs. Delaware. And the fourth challenge is they did not knock or announce when they came in. That's required by the Fourth Amendment because a person has the right to give up possession of their home to the police or the entry of their home to the police by the police saying who they are, why they're there so violence doesn't erupt. That's Miller versus United States. It's not real clear in the Arkansas Rules of Criminal Procedure whether it's required or not. That's what I was looking up during the recess. But Miller makes it a Fourth Amendment mandate regardless of what the rules say.

MR. HARMON: They did knock and announce police.

MR. HALL: She didn't hear them.

THE COURT: Well, do you want to offer any evidence besides the exhibit that you've introduced.

MR. HALL: I'll have the affidavit and the warrant, which have to be exhibits. I'll just make them one combined exhibit, Defendant's 2. Call Henry Efird.

(THEREUPON, the item was marked for identification as Defendant's Hearing Exhibit No. 2. (follows at J.A. —)

THE COURT: You're still under oath.

OFFICER HENRY EFIRD
(R. 166-82)

called as a witness on behalf of the Defense, after having previously been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HALL:

Q You were the affiant on a search warrant for December 31, 1992?

A Yes.

Q Could you give the Court the chronology of when what was done to obtain the search warrant and then the search itself?

A I obtained the information and I went to the Prosecuting Attorney's Office in Benton and I met with the Deputy Prosecuting Attorney, Mr. Mike Robinson. We did an affidavit for the search warrant and at that time I left and went to Sheridan and presented the search warrant to the Judge.

MR. HALL: Your Honor, to assert that matter, we're going to number these pages so the record will be clear of what we're talking about.

Q Mr. Efird, state this for the record before I hand it to you, I've got Defendant's Exhibit No. 2, which is a search warrant which is apparently three pages long, signature of the Judge on page three along with a return and stating inventory was made and if these pages don't coincide with yours, that's okay, we're just stating it for the record. Page four of this is the affidavit, which at

the bottom says, "Date of Affidavit." It's typed, handwritten is 12/31/92 and then there's handwritten information. Is that your handwriting at the bottom?

A No, sir.

Q Whose is it?

A Judge Cole.

Q And to page five, which is the second page of the affidavit is your signature?

A Yes, sir.

Q And, is that sworn to in Judge Cole's presence and then page six is the application for search warrant signed by Mr. Harmon?

A Yes, sir.

Q Page seven apparently is the inventory?

A Yes, sir.

Q Which is signed, "John Garner, DTF"?

A Yes, sir.

Q Let you look at that and verify it. Is that all the information there is on the search warrant?

A That's all I know of. Yes, sir.

MR. HALL: Defendant's 2 already been admitted?

THE COURT: Yes, sir.

* * * *

Q How long had you been working with Ms. Potts, the informant?

A Approximately a month.

Q Prior to 11-22 and 11-23-92, how long had she been working for you at that time?

A She had just went to work because she was assigned to me.

Q Why was she assigned to you?

A Because she came from Hot Spring County.

Q How did she come to be assigned to you?

A An agent had contacted her and talked to her, her and her husband and they had wanted to work for the Drug Task Force.

Q Did you know why they wanted to work for the Drug Task Force?

A No, sir, I had just been recently employed up there.

Q Do you recall your testimony from the Bryson Jacobs' trial on that? Page 310 of the transcript, the transcript from the Supreme Court and this is your testimony, I'v got each witness and your's starts at 276. This is on cross, "Why did Joann Potts decide the become a good citizen and be a confidential informant?" Answer, "She said she was tired of drugs and she had a baby that she had to raise and she said we wanted to help get some off the streets." Do you recall that testimony?

A Yes, sir.

Q That was your understanding at the time?

A Yes, sir.

Q Anybody tell you about her being arrested?

A I had knowledge that she had been arrested, but she was not charged.

Q Did you arrest her for drugs?

A Her and her husband both had been arrested for drugs.

Q And their truck was seized?

A Yes, sir.

Q And they agreed to work to get their truck back?

A No, sir. I have no knowledge of them getting their truck back.

Q She agreed to work and she ultimately was not charged?

A I don't know anything about that conversation. The only thing I know is that her and her husband had been arrested.

Q Do you know who arrested them?

A I do not know. And she had contacted Steve Gullett and said that she wanted to work. And they asked me if I could use her. So, I made contact with them. I didn't go into details, what their charges were or anything.

Q But you knew at the time—

A I knew that she had been involved in some drug charges.

Q And she had been arrested for it but not charged in Municipal.Court or Circuit Court, correct?

A I knew that they had been charged, but I didn't know whether the cases had been to Court or not at that time.

Q I'm assuming some things in my questions, thinking that's how it all went down. I wasn't trying to ask you leading questions. If I put words in your mouth at all, will you correct me? At the time you did the affidavit for the search warrant, you know that she had been arrested, she wasn't what we call citizen informant?

A I knew that there were charges pending on them or I knew that they had been charged, let me put it that way.

Q She had also been paid for her work, had she not?

A Yes.

Q How much?

A I don't have the records in front of me, but I think it was $25.00 a buy.

Q I won't ask you the names of any other people. But, she made buys from other people?

A Yes.

Q How many other people and how many buys?

A As I recall correctly, there was two or three other cases pending.

Q She got $25.00 a buy?

A Yes.

Q And she was paid in cash?

A Paid in cash, signed a receipt.

Q She got paid the day she brought you the drugs back?

A The day she bought the drugs.

Q And you knew all that when you filled out the affidavit?

A Correct.

Q How many times had Mrs. Potts been to see Sharlene Wilson prior to the buys actually occurring?

A I could not tell you.

Q More than once?

A I would assume that there was more than one time.

Q Did you tag along, surveillance, that type thing?

A I had been watching Sharlene and Bryson Jacobs' residence for several months because we had had a lot of complaints on the traffic and I'd been running license numbers and everything. I pretty well knew what was going on over there.

Q But in the period prior to the 23rd or 22nd of November, how many times had she been in that house or in contact with Sharlene, let me put it that way, either in the house or outside?

A I couldn't actually tell you how many times she had been in contact with her. I don't know. The only time I can tell you that she was definitely in contact with them was whenever I was there.

Q And, that was how many times, approximately?

A Three or four times.

Q Did you make any reports of those contacts that no buy occurred?

A No, sir.

Q How many times did no buy occur?

A A couple or three times. Either Sharlene wasn't there or she was gone and she would be right back or something like that and then I had watched Sharlene go to her residence at Harp.

Q The occasions when you sent Mrs. Potts in, you believed that Sharlene Wilson was home on those days, didn't you?

A I listened to it on the transmitter, the—

Q Well, you surveiled the house to determine whether or not Sharlene Wilson was home?

A I would take and find out if her truck was there and usually if her truck was there, she was there.

Q Some occasions Sharlene Wilson was there, but no buy occurred, correct?

A That's correct. But she stated that she was out.

Q But you don't have any reports of those incidents when no buy occurred?

A No, sir.

Q Is it not incriminating that an alleged drug dealer says, "I wish I could help you, but I'm out"?

A Yes, sir.

Q And, that goes to their intent to deliver. But, you didn't make any reports of that?

A No, sir. I wanted it on actual tape.

Q We have tapes of those prior occasions where—

A I have tapes of two of the buys and one of the tapes was bad.

Q Prior to the buy, when Potts went in to try and make a buy and one wasn't made, do you have a tape of those?

A I had a tape of those and we went and rewound the tapes and when the actual buy went down, we used the same tapes.

Q And you rewound the tape at the beginning—

A Back at the beginning.

Q So, the tapes of where no buy occurred were recorded over?

A That's correct.

Q And they're unavailable?

A That's correct.

Q And there's no written reports of those?

A That's correct.

Q On one of the methamphetamine buys, did Sharlene Wilson say that she had to get the drugs from somebody else or did she leave to go get them and come back?

A On the methamphetamine?

Q Uh-huh.

A No, sir.

Q It came right out of the house?

A She came straight out of the house with it.

Q And she did obtain that after prior meetings with Ms. Potts?

A I don't know about any prior meetings with Ms. Potts or anything like that. The only thing I know, I

was contacted and she was going to buy a gram and I wired her, gave the money to her, observed her go into the house and she came out with four triangle squares.

MR. HARMON: Your Honor, I don't see what this has to do with the search warrant. We're pre-trying the case.

THE COURT: Proceed, the objection is overruled.

Q Did you have her house under surveillance in the days immediately prior to when the buys occurred?

A No, sir. I might drive by there occasionally or drive by on the block down to where I could see the residence.

Q Did you inquire or investigate at all to determine where Sharlene Wilson had to go to get the methamphetamine?

A No, sir.

Q There was no evidence that she made it herself in the house when you got there?

A No.

Q There was no drug lab there?

A No, sir.

Q When you went on the raid, who was with you?

A Roger Walls, John Garner, two officers from the Hot Spring County Sheriff's Department—

Q Were they in uniform?

A Yes, sir. Steve Gullick.

Q He's a DTF officer?

A He was a DTF officer at that time.

Q Steve Gullick, Efird. Uniformed officers, Gullick, anyone else?

A Mr. Harmon was in a vehicle.

Q Separate vehicle?

A Yes.

Q When did he go in or did he?

A I could not tell you.

Q Who was the first person in?

A I want to say it was Mr. Walls, well, I'm assuming, Mr. Walls and the two uniform officers and Mr. Gullick. I was about the fourth person in the residence.

Q Did Mr. Walls have the warrant in hand? Who had the warrant in hand, let's put it that way?

A I assume Mr. Walls had the warrant in hand.

Q You had handed it to him prior to that?

A Yes, sir.

Q And they went in with weapons drawn?

A I didn't see no weapons drawn. I didn't have my weapon drawn.

Q The people in front of you, that you could see, have their weapons drawn?

A No.

Q Inside, did you see anybody holster a weapon?

A No, sir, because whenever I went inside, I went straight to the bathroom where Ms. Wilson was.

Q When you got in, did she, was she where she could hear what was going on?

A Apparently because she had run.

Q She was in the bathroom?

A Uh-huh.

Q Did you see her run into the bathroom?

A They advised me to get to the bathroom.

Q The other two, they saw her, not you?

A Apparently they seen her, I did not see her.

Q So, you in your own mind don't know whether she ran to the bathroom, she was in the bathroom?

A She was in the bathroom.

Q Anybody say who they were and what they were doing there prior to the door, coming to the door?

A At that time I got Ms. Wilson and brought her into the kitchen and what was going on in any other part of the house, I couldn't tell you.

Q Prior to the door opening, you saw the door open?

A Going into the house?

Q Yeah.

A I was getting out of the vehicle.

Q You were at the front?

A Uh-huh.

Q Was there anybody at the back?
A I assume there was officers at the back. I was not back there.
Q Did they come in the back door, too?
A I don't know. I stated I got Ms. Wilson and brought her into the kitchen.
Q If you know, I mean. If you don't know—
A I don't know.
Q When they went in, the house wasn't locked?
A I don't know. I was not the first one in.
Q Well, you didn't see anybody kick the door down?
A No, sir. The door was shut whenever we left. So it was not kicked down.
Q Did you hear anybody say, "Police, we've got a search warrant. Open up", pounding on the door, knocking?
A No, sir.
MR. HALL: That's all I have.
THE COURT: Anything, Mr. Harmon?
MR. HARMON: No.

(Witness excused.)

OFFICER ROGER WALLS
(R. 182-87)

called as a witness on behalf of the Defense, after having previously been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HALL:

Q You were the first person in the house on the execution of the warrant?
A Of the search warrant?
Q Yes.
A I was either first or second. There was two of us that kind of went through the door at the same time, myself and, at that time, a Hot Spring County Deputy, Steve Smith, who now works for—

Q A uniformed officer?
A Yes, sir, he was a uniformed officer.
Q Exactly what time did you arrive at the residence?
A It was late evening. I couldn't tell you exactly what time it was.
Q It was during the day time hours of the search warrant? It wasn't a night time search, correct? Was it about five p.m.
A Sounds about right. It was winter time, it was getting, yeah, about that time.
Q Was it already dark, do you recall?
A I don't recall.
Q Who had the warrant in hand?
A I did.
Q It was given to you by Mr. Efird?
A That's correct.
Q Do you know if the door was locked?
A No.
Q Did you open it and walk in?
A Myself and Deputy Smith went up on the porch. I had the warrant. He was the uniformed officer. The prime door was open, the screen door was shut. We could see people in the living room. We identified ourselves as police officers and told them we had a search warrant and entered while we were doing that.
Q People just sitting around on the couch?
A There was, as we come upon the porch, Mr. Jacobs was standing in the middle of the living room floor facing away from us and he's the person that—
Q Standing?
A Standing, yes.
Q And there was another couple there—
A Right.
Q —were they sitting?
A I don't recall.
Q Did you know what Mr. Jacobs looked like before you went in?
A Yes, I did.

Q Go ahead.
A And we entered the house upon announcement.
Q Nobody tried to resist you?
A No.
Q And you said that it was a screen door was the only thing that was shut?
A Yes, sir.
Q The inside door was not?
A Was not.
Q When you pulled up, did you have any lights on or anything like that?
A Blue lights?
Q Yeah.
A No, sir.
Q It was a silent approach?
A Yes, sir.
Q Do you know how Joann Potts came to become an informant?
A Yes, sir.
Q Would you explain it for us, please?
A She had acquired home problems of her own and agreed to work with the State.
Q Was her problem a delivery or a possession?
A Her main problem was her husband.
Q Was his problem a delivery or a possession?
A I don't recall the exact charge, I don't recall exactly what it was. My contact began there.
Q His vehicle was seized for at least a while?
A I don't recall, could have been.
Q Do you recall who made the case against him?
A I don't.
Q It wasn't you, though?
A No, sir, one of my officers.
Q And, at what point did she agree to cooperate, the same day she was arrested or subsequently thereafter?
A I can't tell youn for sure.
Q You ever talk to her about it?
A I did.

Q How many separate cases did she make, do you know?
A I couldn't tell you exactly. I could guess that there was around a dozen, twelve, fifteen.
Q Do you recall how many different people? I don't need to know their names, just the number of people.
A I couldn't tell you, but that was probably about that many people.
Q Approximately a dozen people?
A Yes, sir, or fifteen.
Q Was she paid for each one of her buys?
A She was paid for some, I don't know whether she was paid for all of them.
Q How much was she paid for each?
A I want to say it was like $40.00. I'm not sure on the exact amount. We have records and statements.
Q Did you give them a 1099 at the end of the year?
A No.
Q Are you exempt from the—
A We're exempt from that.
MR. HALL: That's all I have of Mr. Walls.
MR. HARMON: No questions.
THE COURT: Thank you officer.

(Witness excused.)

* * * *

(R. 188-90)

MR. HALL: On the second point of the motion, that Efird swore to the affidavit, but not before the Judge, I'll withdraw that based on his testimony and also the first argument that it was signed prior to the search. But, I still rely on points three and four, omitting exculpatory evidence. They admitted she had been arrested and was cooperating, was in fact paid, up to forty dollars a case. That was from both Efird and Walls. Efird testified that she had been to the defendant's several times trying to get her to make a sale, but didn't make reports of those because they didn't go down. I'm going to need to add one more witness. I can call Sharlene on the third point.

This is the fourth point but not the fourth issue, knock and announce. He admitted they didn't announce until after they were already coming through the door, he didn't announce outside. I'm going to call Sharlene Wilson. You're still under oath.

SHARLENE WILSON
(R. 190-99)

called as a witness on behalf of the Defense, after having previously been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HALL:

* * * *

MR. HALL: That's all I have. Pass the witness.

MR. HARMON: No questions.

MR. HALL: That testimony goes to the second and third points, that she had been to Ms. Wilson several times and that the third point, and third issue, she had to get the drugs from somebody else. She had to leave to get them and none of that shows in the affidavit and since the informant was paid, she is an agent, not just a citizen informant and not even just a CI, confidential informant. She was paid.

Q Oh, I didn't ask you about the entry. Did you hear anybody say, "Police, I have a search warrant?"

A As I said that day, I had been to the doctor. I had been in Dr. Breashear's office most of the morning.

Q Why?

A I had, I've got stomach problems really bad and it has resulted into to finding out that I've got colon problems. I had, I was throwing up, I had diarrhea and running a fever. I had just came from the doctor. I was in the bathroom throwing my guts up when the police came in. All I heard was a bunch of people screaming and hollering. My son was terrified, absolutely too death and Mr. Hall, there was guns drawn at my son and at me.

Q Who came out of the bathroom—

A Henry Efird pulled his gun on me and it was not John Garner, it was Roger Walls and they grabbed me and they threw me down on the floor of the kitchen.

Q I'm just asking about who entered the house and did you hear them say they were the police and they had a search warrant?

A No. I didn't hear nothing except my little boy screaming, that's when I came out of the bathroom, half dressed. I was pulling by jeans up at the time, when I opened the bathroom door, and came around the corner, and saw the terror in my son's face, then the next face I see is Henry's, then the next one, and then Mr. Harmon's. And the search warrant was handed to me or what was supposed to be a search warrant was handed to me by Mr. Harmon, not Mr. Walls and no one else.

MR. HALL: That's all I have on the knock and announce issue.

MR. HARMON: I have no questions.

(Witness excused.)

(R. 199)

MR. HALL: * * * And, on the exculpatory evidence issue, he omitted evidence is enough to undermine the credibility of the informant and that the Court would require more information. If everything was put before the Court, the Court would have required more information to make that decision to issue the search warrant, so the evidence in 93-63 should be suppressed for that reason and failure to knock and announce.

THE COURT: Is there anything else regarding the motion to suppress?

MR. HALL: No.

THE COURT: Motion to suppress is denied. Do you have any other pre-trial matters?

MR. HALL: No.

* * * *

DEFENDANT'S EXHIBIT 2

SEARCH WARRANT

STATE OF ARKANSAS
COUNTY OF HOT SPRING

TO: ANY LAW ENFORCEMENT OFFICER OF THE STATE

Issuing Judicial Officer: Judge John C. Cole

Place of Application for Warrant: Sheridan, Arkansas

Date of Application for Warrant: December 31, 1992

Affidavit having been made before me by Henery Effird, Agent for the Seventh Judicial District Drug Task Force, has reason to believe that on the premises located at 534 Oaklawn Street, Malvern, Arkansas in Hot Spring County, AR, there is now illegal narcotics in violation of Arkansas Code Annotated 5-64-401 et. seq. and a small caliber pearl handled weapon used in the commission of the sale of a controlled substance.

Description of person, place or thing to be searched: A white framed house located at 534 Oaklawn Street in Malvern, Hot Spring County, Arkansas.

Scope of the search granted: Includes the premises, curtilage and vehicles of 534 Oaklawn Street in Malvern, AR.

Directions to the place to be searched:

From the Hot Spring County Courthouse, go south on Locust Street to West Page Street (Highway 67). Turn right (south) onto Highway 67 and proceed to Oaklawn Street. Turn left onto Oaklawn Street and proceed approximately 1 and ½ blocks to 534 Oaklawn Street located on the left side of the street. It is a large white wood framed house with a porch on the front of the house.

The number of the address, 534, appears on the front of the house.

Grounds for search: presence of illegal narcotics in violation of Arkansas Code Annotated 5-64-401 et. seq. and presence of a weapon used in the commission of the sale of a controlled substance.

and I find there is reasonable cause for the issuance of this search warrant based upon:

(✓) one or more sworn affidavits

( ) sworn recorded testimony

and that the above described property is being concealed on the premises above described and that the foregoing grounds for the application for issuance exist.

This Warrant shall be executed within 60 days of the date issued and returned to the issuing Judicial Officer within 5 days of its execution unless shorter period(s) of time indicated.

(✓) Executed within 3 days of date issued (not more than 60)

(✓) Return within 5 days of date executed (not more than 5)

(Choose One)

(✓) This warrant shall be executed between the hours of 6:00 a.m. and 8:00 p.m.

or

( ) I find reasonable cause to believe that:

( ) the place to be searched is difficult of speedy access.

( ) the objects to be seized are in danger of imminent removal.

( ) the warrant can only be safely or successfully executed at nighttime or under circumstances the occurrence of which is difficult to predict with accuracy and authorized the execution of this warrant at any time, day or night, within 60 days from the date of issuance, or less if indicated above.

If documents other than lottery tickets, policy slips, and other nontestimonial documents used as instrumentalities of crime are authorized to be seized, this warrant shall be executed in accordance with provisions of Rule 13.5 of the Arkansas Rule of Criminal Procedure. Such files or ther collections of documents, among which the documents to be seized are reasonably believed to be located, shall be impounded under appropriate protection where found, unless otherwise indicated.

YOU ARE HEREBY COMMANDED to search forthwith the person or place named for the property specified, serving this warrant and making the search (in the daytime) (at any time in the day or night) and if the property be there found to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property as required by law.

Date issued:

/s/ John Cole
Signature of Judicial Officer

RETURN

I received the attached Search Warrant on the 31st day of December, and have executed it as follows: on 12-31-92, at 5:00 p.m. o'clock. I searched the person or premises described in the Warrant and left a copy of said Warrant with Sherlene Wilson together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the Warrant: See attached

The inventory was made in the presence of Henry Efird, Roger Walls—DTF.

I swear that this testimony is true and this is a detailed account of all property taken by me pursuant to the Warrant.

/s/ John Garner
Title: Supervisor

SUBSCRIBED AND SWORN TO AND RETURNED BEFORE me on this 5th day of January, 1993.

/s/ John Cole
Judicial Officer

AFFIDAVIT IN SUPPORT OF APPLICATION FOR SEARCH WARRANT

The undersigned affiant, being duly sworn and under oath before a judicial officer, states that the facts and circumstances tending to show that such persons or things are in the places or things are in the possession of the persons or places to be searched as requested on the attached application for a search warrant, are as follows:

My name is Henry Effird and I am an Agent with the Seventh Judicial District Drug Task Force. On December 30, 1992, at approximately 19:45, I met with a confidential informant in Malvern, AR. The informant called the residence of Sharlene Wilson at 332-8733 and spoke with Bryson Jacobs about the purchase of marijuana. The informant spoke with Sharlene Wilson about ten minutes later and arranged to purchase marijuana at the Country Mark Grocery Store. I briefed and searched the person and vehicle of the informant and provided him/her with $40.00. Myself and another agent of the Seventh Judicial District Drug Task Force went to 534 Oaklawn Street in Malvern, AR, and observed Sharlene Wilson leave the residence. We followed her to the Country Mark Grocery Store where we observed the transaction occur between the informant and Sharlene Wilson at approximately 20:05. Myself and the Agent then followed Ms Wilson to her home at 534 Oaklawn Street in Malvern, AR. The confidential informant met me at the Hot Spring County Courthouse and gave me one bag of green vegetable matter and $5.00. The informant stated that during the transaction Sharlene Wilson pulled a chrome plated, pearl handled, small caliber pistol and waived it in her face several times. The informant was searched and no other money or contraband was found. The evidence was turned over to John Garner of the Seventh Judicial District Drug Task Force for submission to the Crime Lab.

Directions to 534 Oaklawn Street, in Malvern, AR are as follows: From the Hot Spring County Courthouse, go

south on Locust Street to West Page Street (Highway 67). Turn right (south) onto Highway 67 and proceed to Oaklawn Street. Turn left onto Oaklawn Street and proceed approximately 1 and ½ blocks to 534 Oaklawn Street located on the left side of the street. It is a large white wood framed house with a porch on the front of the house. The number of the address, 534, appears on the front of the house.

The particular facts bearing on the reliability of the confidential informant and the means by which the information was obtained were:

The informant has made three purchases of controlled substances for the Seventh Judicial District Drug Task Force. The informant has no prior felony convictions.

Date of Affidavit: 12/31/92

The confidential informant had made a purchase of marijuana on 11-21-92 from Sharlene Wilson at the residence described and Bryson Jacobs was present; a purchase of methamphetamine was made at the residence by the C.I. on 11-13-92 and Bryson Jacogs was present.

* * * *

[Jurat and oath omitted]

APPLICATION FOR SEARCH WARRANT

Comes now the prosecuting Attorney for the Seventh Judicial District and hereby files formal application before this Magistrate for the issuance of a Search Warrant. This application is based on the sworn testimony of the affiant who completed the affidavit in support of this application which is attached hereto.

The person or place to be searched is 534 Oaklawn Street, Malvern, Hot Spring County, AR.

The directions to the place to be searched are:

From the Hot Spring County Courthouse, go south on Locus Street to West Page Street (Hikhway 67). Turn right (south) onto Highway 67 and proceed to Oaklawn Street. Turn left onto Oaklawn Street and proceed approximately 1 and ½ blocks to 534 Oaklawn Street located on the left side of the street. It is a large white wood framed house with a porch on the front of the house. The number of the address, 534, appears on the front of the house.

and the contraband expected to be found or evidence of a crime expected to be found are illegal narcotics in violation of Arkansas Code Annotated 5-64-401 et seq. and a weapon used in the sale of a controlled substance.

Wherefore, based on the accompanying affidavit in support, the Office of the Prosecuting Attorney for the Seventh Judicial District respectfully requests that the Search Warrant be issued.

[Jurat omitted]

12/31/92

SEARCH WARRANT [Inventory]

(1) Raven 25 cal semi auto pistol ser #1758414
(2) sample of suspected methamphetamine from toilet
(3) tupperware container w/meth
(4) four yellow tablets. (Valium)
(5) $355.00 cash
(6) ziplock w/meth
(7) pieces of paper w/drug records (suspected)
(8) pack of desposable syringes
(9) 25 cal ammo
(10) 270 cal ammo
(11) 243 cal ammo
(12) Browning 16 ga shotgun ser #60521
(13) two boxes shotgun shells
(14) Red gym bag w/drug evidence
(15) metal box w/drug evidence
(16) Jason binoculars in case w/drug records
(17) metal tray w/drug evidence
(18) used syringe

/s/ John Garner
DTF

DETECTIVE GARY MARTIN
(R. 409-11)

called as a witness on behalf of the Defense, after having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HALL:

Q State your name and occupation, please.
A I'm Detective Gary Martin. I work for the Little Rock Police Department Narcotics Division.
Q Are you presently assigned to the Federal Drug Task Force?
A Yes, I've been with the DEA for fifteen years.
Q Little Rock Police Department pays your salary and assigns you to them?
A Yes, I've been with Little Rock twenty years.
Q And since you're with the DEA, you're governed by Federal regulations?
A Yes, I am.
Q Since Federal regulations prohibit you from talking about subject matter, I'm going to ask you some very limited questions. Do you know Sharlene Wilson?
A Yes, I do.
Q She ever work as an informant for you?
A Yes.
Q She every testify before a Grand Jury?
A Not for me, no.
Q For the DEA at all?
A Not that I know of, no.
Q She provided information to the U.S. Attorney's Office?
A I don't know.
Q Not in your presence?
A No.

Q How many times did she work for you as an informant?
A She made two drug purchases for me.
Q Were they not in Hot Spring County?
A No, they were in Little Rock.
Q Could you tell me approximately when, the year?
A Right before she was incarcerated. So, I don't know how long she's been incarcerated.
Q '92 or '93?
A May have been the first of '93. I don't how long she's been incarcerated.
MR. HALL: Thank you. That's all I have.

CROSS EXAMINATION

BY MR. HARMON:

Q Mr. Martin, did you know she was selling drugs here in Hot Spring County?
A No, I did not.
Q Is it unusual for someone to be an informant and also be selling drugs, too?
A No.
Q In fact, that's what some om them do, walk both sdies of the street, isn't it?
A Yes.

* * * *

SHARLENE WILSON
(R. 428-29)

called as a witness on behalf of the Defense, after having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HALL:

Q State your name, please.
A Sharlene Marie Wilson Jacobs.

Q And, you're the defendant in this case?
A Yes, sir, I am.
Q How old are you?
A I'm thirty-seven years old.
Q Is Bryson Jacobs your co-defendant?
A Yes, sir, he is.
Q And you were married while the case was pending?
A I married him the day before he was convicted, July 13, 1993.
Q He was convicted in this case, too?
A Yes, sir, he was.
Q You been married before?
A Six times.
Q So, you've got multiple last names?
A Yes, sir, I don't have very good luck with marriages.
Q And, you have a prior conviction for hot checks?
A Yes, sir, for forgery hot checks, yes, sir.
Q What County were they from?
A In this County here.
Q How long ago?
A I think back in around '87 or something like that. I can't be sure, somewhere along in there.
Q You discharged on probation?
A Yes, sir, I was.

* * * *

Q Prior to the day, November 22nd. In fact, I'll give you some specifics on this. This is 93-1, Count I, said you delivered seventy dollars worth of marijuana to her?
A Uh-huh.
Q Do you recall the events prior to that occurrence?
A I don't understand what you're saying, Mr. Hall. Would you re-word it for me?
Q On the charge that's Count I in 93-1, it says that on November 22, 1992, that you delivered seventy dollars worth of marijuana to her, to Joann Potts?
A Uh-huh.

Q Do you recall the events, ten days or so immediately preceding that?
A Preceding, as in before?
Q Right.
A Just that Joann had been coming over helping me with my yard sales. She come over one night very, very upset wanting to get high. Asked me did I know where I could go get anything.
Q This is what you testified to before?
A Yes.
Q Immediately prior to the 22nd?
A Yes.
Q And, did you help her get any?
A Yes, I did.
Q And how did it happen?
A She said that she was fixing to leave Richard and that she was fixing to go out of town and that she wanted some for the road and would I please get her some. I hesitated first and I knew in my heart that she didn't have the money. She had to go get the money. I knew in my heart I shouldn't have done it, but I left and I went out and got the stuff and I brought it back to her. She had to leave. I had to leave and then when she got back I was already back and there I exchanged the stuff, the pot.
Q How much did you pay for it?
A I think thirty-five dollars. Thirty-five dollars.
Q How much was it, a quarter ounce?
A That's thirty-five dollars a quarter of an ounce, yes. So, two quarters yould have been seventy dollars.
Q Did you make any profit off that transaction?
A No, sir, I just did it for her.
Q It says on the 23rd, Count II, that you delivered methamphetamine to her. Did you do that?
A I delivered methamphetamine, I don't think it happend on that date. I'm not for sure, but it seemed like it happened all kind of together.

Q Why did she want methamphetamine? Did she say?
A Because she was leaving town.
Q Leaving Richard?
A Uh-huh, going out of town.
Q Why did you help her get it?
A Because I wanted her to leave me alone. She was at my house everyday. Just all of a sudden she made statements that she wanted to get high. She asked me on several occasions where I got it from, you know. And, I didn't ever tell her. There was a few weeks period in there that I couldn't go get her anything because there wasn't nobody around to get anything to for anybody.
Q Did she specfically ask for methamphetamine?
A Yes, she did.
Q Speed?
A No, sir, she asked did I know where she could get any crystal, period, not crank, crystal.
Q Where did you have to go to get that for her?
A Where did I have to go?
Q Yeah.
A I went to Glen Rose.
Q Did you make any profit on that?
A No, sir.
Q Between the occurrence on the 22nd, of the marijuana and when she asked for the crystal, how long did that take?
A That's what I'm saying. There was just, it was right there together, okay. The best I can remember, both things were purchased at almost the same time.
Q How many times prior to you helping her get it, did she actually say that she wanted to get it?
A I couldn't put a number on how many times she's asked.
Q Once a day for two weeks, twice a day?
A At least once every other day. She made a conscious effort and she, every day she knew she could come over and smoke a joint, everyday.

Q Did she?
A Sure. I'm not going to say every, every day, but most every other day or of a evening, twenty minutes here, twenty minutes there.
Q Be more specific. Whenever she came over to your house, did she smoke marijuana with you?
A Sure.
Q What happened between November 22nd and 23rd and December 30th?
A What happened?
Q On the 30th. She testified that you delivered a quarter ounce of marijuana for thirty-five dollars to her.
A On what day?
Q December 30th, the day before the raid.
A That transaction never took place.
Q Did you see her between the—
A I did see her that day.
Q —22nd, November 22nd and the end of the year?
A Yeah, I saw her a couple of times.
Q Did she come over to your house?
A Sure did. I gave her seventy-five dollars and took her to Fred's.
Q To do what?
A To Christmas shop for her baby and to buy her some food and make a conscious effort to help the child.
Q Was Richard working then?
A From what I understood at that lumber mill. Every time I ever went to their house out at Harp, he was always there piled up on the couch or he was out doing whatever. I don't really know. But most of the time when I went out there he was there.
Q Was he working then?
A Pardon me?
Q Was he working then?
A I don't really know. Most every time I went out there he was there, which was of an evening.
Q In the approximately six weeks, five and a half to six weeks between November 22nd and 23rd and Decem-

ber 30th, how many times did you see her if you can recall?

A From the time that I took care of that and December 30th, is that what you're asking me?

Q Yeah.

A How many times? Maybe three at the most, three times because that was the Christmas holidays and it's Christmas tradition, I always went home. I helped take care of my Mom. My Mom has—

Q Where is home?

A Prattsville and that's my homeplace. That's where I was raised at and I would go home and visit Mom and Dad and see how they were doing and help cook and get ready for the Christmas holidays and I was doing the same thing by going out to Mr. and Mrs. Jacobs and helping her as well because she just had a massive heart attack.

Q Did you meet her at all on that day. She said the two of you got together that day?

A What day?

Q December 30th, I'm sorry.

A Yeah, I'm trying to think. It was of the afternoon. I seen her at the Fuddy's, Milk and More or something like that, down here on Page, it's a convenient store. I seen her down there. We passed. I pulled in the Milk and More to get out to get gas, she got out, turned around and came back and met me. I was getting the gas and she walked up to me and at that point, we just was having general small talk. We wasn't really talking about anything in particular, I mean, "Well, what did you get for Christmas? I got this, I got that. How's the baby?" Because the baby wasn't with her. Her brother Jackie was with her. I talked to him for a few minutes and at that point, she asked me did I have any weed and I told her, "No, I did not." And she asked me could I get her any and I told her, "No, I could not." And, that was it, period, end of sentence. Later on that evening she come by the house again, which I was at home on Oak-

lawn Street and she come by the house again and I was not there. I was gone. Bryson had told her to, that I was not here, I'd be gone for about ten or fifteen minutes. She could come back if she wanted to. In about ten or fifteen minutes later I guess after I got in, because when I got back Bryson told me she had came by.

Q Did she come back?

A Yeah, sure did. Welcomed her in my house.

Q You saw her that day at your house?

A Uh-huh.

Q Smoke marijuana with her that day?

A No, I didn't have any pot that day, none whatsoever.

Q This is the day before the raid?

A Yes, sir.

* * * *

Q Did you know that marijuana seeds were found in the house?

A Yes, sir, I do.

Q Did you know that they were there prior to the police finding them?

A No, I did not.

Q Do you know where they were found?

A I was told in the top of a, the house had a real high ceiling and there was a pantry built in the corner of the kitchen where they blocked out a door and it had like ten shelves in there. It was so high you didn't even have to go all the way up and it was like from the ground up, from the floor up and as to my understanding where the seeds were found.

Q Did you put them there?

A No, sir, I did not.

Q How long have you been in the house prior to the raid occurring?

A I moved into the house on Oaklawn Street in May.

Q You ever been inside the top shelves of the cabinets?

A Only far enough to reach up there and wipe the dust and the bugs and general cleaning. But as far as

having to drag a chair over there each and every time to get, well, I didn't have that kind of canned food to put in there no way. That's what it was to store perishable foods, non-perishable foods.

Q What purpose do marijuana seeds serve?

A What purpose do marijuana seeds serve?

Q Yes. You can't smoke them, can you?

A. Sure can't.

Q Did you have any marijuana seeds that you knew of?

A Probably on my tray. Whenever I get through with what I just smoked, I would roll it up, I would discard the waste and throw it in the trash, flush it down the toilet, whatever. There was no purpose for me to keep it around.

Q Is that for the purpose of growing marijuana?

A Sure, I guess. I can't make plants grow, much less marijuana.

Q Do you have any idea where the marijuana seeds came from?

A No, sir, I do not.

Q To your knowledge, did you have any meth-amphetamine in the house—

A No, sir, I did not.

Q —the day of the raid?

A No, sir, I did not.

Q Know where it came from?

A No, sir, I do not.

Q The day of the raid, would you describe what happened?

A The entire day from when I got up that morning?

Q No, just around the time of the raid.

A Oh, around the time of the raid. Let's see. I went to the doctor. I went by the bank and I cashed a check for some ties that we had sold at Casa Gertes in Hot Springs Village, went to the house, I laid down.

Q Who else was there?

A At the time, just me and my son, earlier that after-noon.

Q When did Bryson come?

A About ten minutes before the police tore in the house.

Q Who was with him?

A Who was with Bryson?

Q Yes.

A Bryson was by himself. He has just pulled up into the driveway.

Q Did the Cothern's get there before he did?

A Yeah, right before he did. I had been sick all afternoon, let's see, I'm trying to remember. Linda and Terry got there and we were sitting there watching TV and we were supposed to go over to their house that night and play cards, but we never made it because I didn't feel good. Plus I ended up going to jail. But, that was their purpose for coming by to see if we was still going to come over and play cards that night. And my son was there with me and then Linda and Terry had gotten there maybe five or ten minutes before Bryson got there and at that, as a matter of fact, I was just come back out of the bathroom when Bryson had got there and was enroute back whenever the police were coming in. As a matter of fact, the police, I didn't even have my jeans up when the police come in the door. I was, like I said, I was ill.

Q What caused you to come out of the bathroom?

A I was through. No, I heard a noise. My son run back through the house and was hollering and it's a mother's instinct to react to her son or to a child and I reacted. I come out of the bathroom as fast as I could. In the process of putting up, snapping up my jeans and the bathroom sits off to the side of the house and there was a wash room, then the door into the kitchen, which was a very large kitchen and just as soon as I exited out of the bathroom into the kitchen, I met Mr. Henry Efird and Steve Gullick with Mr. Harmon presiding with guns drawn in my kitchen and took me down to the floor at that time, searched my person. At that time, handcuffed me and moved me into the living room area of my house.

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Q Where was your purse at that time?

A My purse was in the kitchen. My purse always sat in the kitchen beside my comupter.

Q Did Henry Efird search your purse?

A I guess he did. I did not see Henry Efird search my purse. I was in the other room. Roger Walls was in my back bedroom and I say that's the back bedroom, that's my bedroom and had Linda face down on my bed with her hands handcuffed behind her. When they brought me through the living room by that time, the DTF already had Bryson up and out of the house. I do not remember seeing Bryson from the time, he wasn't there. They took him out of the house immediately. Terry, Linda's boyfriend was face down between my coffee table and my couch, handcuffed behind his back also. At that point, I sat there, Mr. Harmon came over to me and handed me what was supposed to have been a search warrant and began to make remarks, statements to me. They went to going through everything humanly possible. He got my address book. Bryson's, they had papers strewn from one end of my house in the living room and it was a mess.

Q Where were the syringes in the house?

A The syringes?

Q Yes.

A The syringes were in a first aid kit in the top chest-of-drawers of my bedroom.

Q What purposes did they serve?

A The syringes?

Q Yes.

A I used syringes to use on two elderly patients that I care for part time with the Arkansas Health Care, the Hopeless Program out of Hot Springs. Do you want the two ladies' names? One of them is now since passed.

* * * *

Q The police found six or eight them, syringes that were still packaged.

A Uh-huh.

Q The one that was unpackaged, do you recall if the one was unpackaged?

A I don't recall one being unpackaged. The bag in my first aid kit was tore open. I mean, sir, the, my blood pressure kit was in there along with everything else that you use right down to, you know, how to administer CPR in the first aid kit.

Q Wheer did you get your nursing training?

A In Barstow, California.

Q What school?

A At Barstow Community College.

Q Two year program?

A Yes, sir.

Q Were you an LPN in California?

A No, sir, I'm a licensed vocational nurse in California.

Q Are you licensed in Arkansas?

A Yes, sir, I am.

Q As what?

A As an LVN and I've worked as a certified aide.

Q Did you know Henry Efird prior to December 31st?

A Yes, sir, I do.

Q How far back you two go?

A He's related to my father.

Q And, have you worked for Hot Spring County Sheriff's Office?

A Many years ago, yes, sir.

Q Long time ago when he was CID there?

A Yes, sir, I have.

Q How long ago?

A I had up until I guess about 1986, which was the year that I was raped.

Q And when you got raped, what happened to you?

A What happened to me?

Q Psychologically?

MR. HARMON: Objection, Your Honor.

THE COURT: The objection's overruled.

Q And you went to the Dorcus House among other things?

A I withdrew.

Q Get involved with drugs?

A Yes, sir, I did, very badly.

Q How long did that last?

A Until I went to the Arkansas Rehabilitation Institute at the Baptist Medical Center in July of that year. I would say around seven months.

Q How long did you stay in the rehab, do you know?

A I would say around forty-five days, maybe a little longer, maybe be a little less. It was either from a thirty to forty-five day program and I did coin out.

Q What kind of drugs were you involved with back then?

A Cocaine and pot. I had never used it intravenously until that point, but I didn't want to live no more at that point either.

Q Did you talk to your son about drugs?

A Yes, sir, I sure did.

Q Did you explain to him how you can get addicted, what they do to you?

A Yes, sir, I sure did.

Q Do you smoke marijuana in front of your son?

A Yes, sir, I have.

Q Why is that?

A Why is that?

Q Yeah.

A Stupidity on my part. I never deny to my son, I've never told my son that it was right. He knows that it's wrong. Both of my kids know that what it's done to me and mine and their lives. So, I know good and well I don't think I have to worry about my children abusing.

Q I noted that Ricky in his statement referred to knowing you were at rehab. Did you explain rehab to Ricky?

A Yes, sir, he came and visited me there quite often with his stepfather.

Q Where did the hemostats come from, Exhibit No. 17, the State says it's yours?

A Well, quite truthfully both hemostats don't belong to me. I did possess what you call suture stats, which are smaller. They're more pointed and they kind of got a little curve on them to where you can snip sutures if you had to be stitched or something. That's what I had. I'm not, those there are not in my, were not mine. They do not belong to me. Now, where them ones are that were in that first aid kit that night along with my first aid kit, I do not know.

Q Were those hemostats Penny's?

A Well, they could have been. She's kind of, they may have been hers. Penny's quite open. She told you how she acquired them.

MR. HALL: Pass the witness.

CROSS EXAMINATION

BY MR. HARMON:

Q Sharlene, are you telling this jury you never used any drugs until after 1986?

A No, sir, I'm not telling this jury that.

Q Were you convicted in Garland County for possession of drugs in 1980?

A Not that I know of.

Q How many convictions do you have?

A The only conviction I know of is the forgery and the hot checks. That's the only conviction that I'm aware of.

Q That would be two in Hot Spring County and one in Grant County?

A It could be. I'm not really sure, sir. There was a series of—

Q One in 1987 and two in 1988?

A Yes, sir.

Q Didn't you testify on direct examination you only had one prior conviction?

A It's to my understanding that the convictions ran concurrent.

Q You have three prior convictions, Sharlene.

MR. HALL: Your Honor, she did not testify of one prior conviction. She said hot checks and forgery.

THE COURT: I'm sure the jury is aware of what she testified to and keep that in mind, ladies and gentlemen.

Q You stated that you were a rape victim?

A Yes, sir, I am.

* * * *

Q Okay. What did you do on the 31st of December of '92 while you were in the bathroom?

A Pardon me?

Q What did you do in the bathroom?

A Well, what do you usualy do when you go to the bathroom?

Q Well, I don't usually flush an ounce of pot down the toilet.

A Did I flush an ounce of pot down the toilet?

Q Well, let's read your deposition here, page 30, lines six through fourteen. What did you tell Mr. Horton you did in the bathroom?

A "Yes, I had an ounce of weed." Do you want me to read this?

Q Yes, I want you to read that.

A Where it says, "Okay, I got up and went into my bathroom and I opened by bathroom pantry which I had a very large bathroom and underneath some quilts I had approximately an ounce of weed and I flushed it. I flushed it down the drain, I mean down the toilet. Now, when you're talking about weed, you're talking about marijuana? Yes, sir. Okay, I'm talking about weed? Yeah. Okay." Would you like for me to continue?

Q No, I just want to know what you did. Did you do that?

A Yes, sir, amongst using the bathroom.

Q Well, which way is it now. You lied until I showed you this.

A I did not lie.

Q You said you didn't do anything like this until I showed you the deposition.

A I did not say that. I told you I had come to the bathroom and I went back to the bathroom. That's what I said.

* * * *

Q Now, Sharlene, just so we all understand. You're not denying that you sold this bag of pot to Joann Potts, is that right?

A I'm not denying that.

Q That's the one November 22nd of '92?

A That's the date you said it was. I think there was a date difference in there, but yes, that—

Q You agree that you sold that?

A Yes, sir.

Q And you agree that you sold the methamphetamine on the 23rd of November?

A I believe they were both the same date, sir.

Q You sold it to her whether it was the 22nd or 23rd—

A Yes, sir.

Q —you sold it to her?

A I did.

Q And that's your voice on the tape?

A I'm not so sure that's my voice on the tape.

Q Well, let's get it straight. A while ago it was. Whichever way you want it.

A This is my voice right here, Mr. Harmon. I'm admitting that I did.

Q Was that you on the tape or wasn't it?

A I don't know—

Q (Interposing) A while ago you said it was.

A At the end of that tape it is me. I don't sound like a man.

Q No, that's Bryson. I want to show you State's Exhibit No. 4 and that's the pot that Joann got from you on the 30th of December?

A She never received no pot from me on that date.

Q This is all a lie?

A Yes, sir, it certainly is.

Q Her and Henry Efird made all this up?

A I'm not questioning that.

Q Did you see her on the 30th?

A Yes, I testified to that.

* * * *

Q All right. Did you know the marijuana was in your house on the 31st?

A Did I know that the marijuana was—

Q Yes.

A Yes, I did.

Q Because you flushed some of it down the toilet so you knew it was there, didn't you?

A Yes, I had pot.

Q And you knew the hemostats were there and the syringes were there. Did you know the methamphetamine was there?

A There was no methamphetamine in my home.

Q It was in your purse, wasn't it?

A No, sir, it was not in my purse.

Q How did it get in your purse?

A Y'all are supposed to be the experts here. Remember I'm the defendant. I'm admitting to my guilt.

Q But not all of it?

A I don't see where I've denied anything except for the fact that—

Q You're not denying you had the methamphetamine in your purse?

A Pardon me?

Q You're not denying you had the methamphetamine in your purse?

A I'm denying that it was in my purse, yes, sir I certainly am.

Q Where was it?

A Well, I do not know. You were there.

Q Was it in your home somewhere?

A I do not know.

SUPREME COURT OF ARKANSAS

No. CR94-160

SHARLENE WILSON,
Appellant,

v.

STATE OF ARKANSAS,
Appellee.

Appeal from the Hot Spring County Circuit Court,
No. CR93-1-1, CR93-63-1
HON. JOHN W. COLE, JUDGE

AFFIRMED.

OPINION DELIVERED JUL. 11, 1994

STEELE HAYS, Associate Justice

Appellant Sharlene Wilson was tried and convicted of possession of marijuana, delivery of marijuana, delivery of methamphetamine, and possession of drug paraphernalia. The jury sentenced her to a total of thirty-one years imprisonment in the Arkansas Department of Correction and one year imprisonment in the Hot Spring County Jail. She was fined a total of $11,000. On appeal Ms. Wilson charges the trial court with two errors: (1) denying her motion to dismiss based upon outrageous police conduct and (2) denying her motion to suppress the fruits of the search of her residence. Finding no error, we affirm the judgment of conviction.

Ms. Wilson was incarcerated in the Malvern City Jail awaiting trial. She was represented by counsel at the time. Officers with the Seventh Judicial District Drug

Task Force wired an informant and sent her into the appellant's cell. After a brief conversation with the informent, Ms. Wilson discovered the transmitter. At no time did Ms. Wilson incriminate herself or supply any information pertinent to her case.

Officer Roger Walls testified he had information that Bryson Jacobs, who had been living with Ms. Wilson, was planning an escape from the Hot Spring County Jail. According to Walls's testimony, the informant was sent into the cell to uncover the plans for escape. However, other officers testified to a dual purpose in the use of the informant: to obtain information which could be used against Ms. Wilson and to obtain information regarding the escape.

The appellant moved to dismiss the charges against her based upon a Sixth Amendment violation. Ms. Morrison contends the outrageous conduct of the officers warranted the extreme remedy of dismissal of the charges. Because we find that no prejudice occurred, we will assume, arguendo, that the Sixth Amendment was violated under the circumstances of this case.

In *United States v. Morrison*, 449 U.S. 361 (1981), the United States Supreme Court held that *"absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the [Sixth Amendment] violation may have been deliberate."* (Emphasis supplied.) Factually, Ms. Morrison had retained counsel to represent her in the pending criminal proceedings. Thereafter, two agents of the Drug Enforcement Agency, aware that she had been indicted and had retained counsel, sought to obtain her cooperation in a related investigation. They met with her without the knowledge or permission of her counsel. The agents told her it would be to her advantage if she cooperated but she would face a stiff jail term if she did not. At no time did Ms. Morrison incriminate herself or supply any information pertinent to her case. Ms. Morrison moved to dismiss the indictment. In determining that

dismissal of the indictment was not appropriate, the Court noted:

> [W]hen before trial but after the institution of adversary proceedings, the prosecution has improperly obtained incriminating information from the defendant in the absence of his counsel, the remedy characteristically imposed is not to dismiss the indictment but to suppress the evidence or to order a new trial if the evidence has been wrongfully admitted and the defendant convicted. In addition, certain violations of the right to counsel may be disregarded as harmless error. [Citations omitted.]

Similarly, in *Massiah v. United States*, 377 U.S. 201 (1964), the Court held that where a Sixth Amendment violation has occurred the defendant's own incriminating statements could not constitutionally be used by the prosecution as evidence against him at his trial. Once again, Mr. Massiah had retained counsel. While he was free on bail a federal agent succeeded by surreptitious means in listening to incriminating statements made by him. At Mr. Massiah's trial these incriminating statements were brought before the jury. The Court held that Mr. Massiah was denied the basic protections guaranteed by the Sixth Amendment when such evidence was used against him at his trial.

Ms. Wilson acknowledges the holdings in *Morrison* and *Massiah*; however, she submits we should reverse and dismiss under Ark. Const. Art. 2, § 8 and § 10. We find the cited provisions of the Arkansas Constitution do not provide for such relief. Further, the appellant fails to allege she suffered any prejudice as a result of the surreptitious actions. We have repeatedly held that an appellant must show prejudice, because this Court will not reverse for harmless error. *Heinze v. State*, 309 Ark. 162, 827 S.W.2d 658 (1992).

It is troubling to find in this record a clear implication that public officials charged with enforcement of law

would, in concert, pursue a course calculated to circumvent fundamental provisions thereof. Not the least of our concerns is the fact that had the plan succeeded, the prosecution of these offenses would have been seriously jeopardized.

Turning to the second point, officers with the Saline County Sheriff's Office and the Seventh Judicial District Drug Task Force executed a search warrant at the home of the appellant. Officer Henry Efird's affidavit in support of the warrant recited that a confidential informant had made purchases of marijuana and methamphetamine from the appellant at the residence. Further, Officer Efird observed Ms. Wilson leave her residence and proceed to a meeting with the informant. At that time, the officer observed a transaction between Ms. Wilson and the informant.

During the search of Ms. Wilson's home, the officers discovered an amount of marijuana, an amount of methamphetamine, and drug paraphernalia. The appellant moved to suppress the evidence seized in the search on the ground that the affidavit contained omissions of fact which were material to the finding of probable cause and on the ground that the officers failed to "knock and announce."

At the suppression hearing, Ms. Wilson contended three exculpatory items were omitted from the affidavit. First, the affidavit failed to disclose that the informant and her husband had been arrested and that she had agreed to cooperate in order to help herself and her husband. Second, the affidavit failed to disclose that Ms. Wilson declined to sell drugs to the informant on prior occasions. Third, the affidavit failed to disclose that when a buy allegedly occurred, the drugs did not come directly from Ms. Wilson's home. Ms. Wilson contends that had these omissions been included in the affidavit it would have undermined the informant's credibility to the point that prob-

able cause would be lacking. The trial court denied Ms. Wilson's motion to suppress the evidence.

In reviewing a trial court's ruling on a motion to suppress, we consider the totality of the circumstances to determine if the trial court's decision was clearly against the preponderance of the evidence. *Pyle v. State*, 314 Ark. 165, 862 S.W.2d 823 (1993). We consider the facts in the light most favorable to the appellee. *Id.* Under *Franks v. Delaware*, 438 U.S. 154 (1978), a warrant should be invalidated if a defendant shows by a preponderance of the evidence that: (1) the affidavit contained a false statement which was made knowingly, intentionally, or recklessly by the affiant and (2) the false statement was necessary to a finding of probable cause.

In *Pyle*, supra, we concluded that even with omissions there must be a knowing intent to deceive, or a reckless disregard of truth. Further, we found the omissions must involve material circumstances which contradict or dispel the incriminating factors in the affidavit. As to the informant's motive for cooperation in the instant case, such an omission simply does not contradict or dispel the incriminating factors in the affidavit. Also, Officer Efird independently corroborated most of the information supplied by the informant which constitutes "particular facts bearing on the informant's reliability." *See* Ark. R. Crim. P. 13.1. Second, we have specifically recognized that the omission of refusals to sell drugs on other occasions does not amount to deception by negation. *Pyle*, supra. Finally, applying the *Pyle* standard, where Ms. Wilson obtained the drugs is immaterial to the incriminating factors in the affidavit.

Even if the omissions were material, probable cause is present in the warrant. Officer Efird stated that he followed Ms. Wilson from her house to a meeting with the informant. Officer Efird observed a drug transaction. Thus, the credibility of the informant is not an issue regarding probable cause Further, as there was probable

cause to believe Ms. Wilson possessed drugs at her residence, where she obtained or manufactured the drugs is irrelevant.

As an additional ground for suppression of the fruits of the search, Ms. Wilson submits the officers executing the search failed to knock and announce their identity before entering the residence. The testimony indicated that the officers entered the home while they were identifying themselves. Ms. Wilson relies upon *Miller v. United States*, 357 U.S. 301 (1958), as the sole authority for her argument. The appellant contends, based upon *Miller*, that the Fourth Amendment requires officers to knock and announce prior to entering the residence. However, *Miller* involved a statute, 18 U.S.C. § 3109, which specified that a law enforcement officer, executing a search warrant, may break open a door only if, "after notice of his authority and purpose," he is denied admittance. The Fourth Amendment was not mentioned.

There is no authority for Ms. Wilson's theory that the knock and announce principle is required by the Fourth Amendment. Furthermore, Ark. R. Crim. P. 13.3 outlines the procedure to be followed in the execution of a search warrant, and provides in part:

> (e) The executing officer, and other officers accompanying and assisting him, may use such degree of force, short of deadly force, against persons, or to effect entry or to open containers as is reasonably necessary for the successful execution of the search warrant with all practicable safety.

Rule 13.3 does not contain a "knock and announce" rule. *See also Dodson v. State*, 4 Ark. App. 1, 626 S.W.2d 624 (1982) (Glaze, J., concurring), *cert. denied*, 457 U.S. 1136 (1982).

In sum, we find no error and affirm the judgment of conviction.

SUPREME COURT OF THE UNITED STATES

No. 94-5707

SHARLENE WILSON,
Petitioner

v.

ARKANSAS

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

November 28, 1994

Supreme Court, U.S.
FILED
JAN 30 1995
OFFICE OF THE CLERK

No. 94-5707

In The
Supreme Court of the United States
October Term, 1994

Supreme Court, U.S.
FILED
JAN 24 1995
OFFICE OF THE CLERK

SHARLENE WILSON,
Petitioner,

v.

STATE OF ARKANSAS,
Respondent.

ON WRIT OF CERTIORARI
TO THE ARKANSAS SUPREME COURT

RECEIVED
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SUPREME COURT, U.S.

PETITIONER'S BRIEF

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Attorney for Petitioner

January 1995

BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

Whether the "knock and announce" rule of the common law is constitutionally mandated under the Fourth Amendment.

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The common law knock-and-announce rule is so fundamental to our constitutional system that it must be considered a part of the reasonableness clause of the Fourth Amendment. Therefore, the Fourth Amendment requires that law enforcement officers executing arrest or search and seizure warrants knock-and-announce before entry, unless entry is otherwise excused by exigent circumstances. 31

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CITATIONS OF OPINIONS BELOW

The opinion of the Arkansas Supreme Court is reported at *Wilson v. State*, 317 Ark. 548, 878 S.W.2d 755 (1994).

BASIS FOR JURISDICTION

The jurisdiction of the Court lies under 28 U.S.C. § 1257. The judgment of the Arkansas Supreme Court was entered July 11, 1994. The petition was filed July 28, 1994.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATUTES INVOLVED

Ark.R.Crim.P. 13.3(e) provides as follows:

> The executing officer, and other officers accompanying and assisting him, may use such degree of force, short of deadly force, against persons, or to effect entry or to open containers as is reasonably necessary for the successful execution of the search warrant with all practicable safety.

STATEMENT OF THE CASE

I. INTRODUCTION

This is a drug case that began with the police targeting petitioner and her soon-to-be husband, Bryson Jacobs,[1] with

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[1] Petitioner and Jacobs were married in jail during Jacobs' trial

an informant. The police made repeated entreaties through a friend of petitioner to sell her drugs. These efforts were first rebuffed, but petitioner and Jacobs ultimately succumbed and engaged in two controlled buys with the informant. The investigation culminated with the execution of a search warrant without announcement, the issue that brought the case to this Court.

II. Facts

A. Overview

Sharlene Wilson, the petitioner, had herself been an informant who did some controlled drug buys for the Drug Enforcement Administration northeast of the Little Rock area. J.A. 55. The police had learned of and then observed some suspicious comings-and-goings from petitioner's and Jacobs' house in Malvern, Arkansas. The police used an informant who was a friend of petitioner[2] to try to make controlled buys of marijuana and methamphetamine from her and Jacobs. After multiple unsuccessful attempts (R. 356), the informant finally was able to make three alleged buys from petitioner and Jacobs on November 22d and 23d and December 30th, 1992. (We say "alleged" because petitioner was convicted by the jury of the first two buys but acquitted of the latter.)

On December 31, 1992, the police executed a search warrant at the Jacobs-Wilson house, and the officers peaceably entered without prior announcement of their identity and purpose; they had no weapons drawn, there was no confrontation, and it was a simple arrest. Present at the time of the search were petitioner, Jacobs, and two visitors, the Coth-

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on July 13, 1993. J.A. 56.

[2] Potts admitted only to being petitioner's acquaintance. However, one of the tape recordings she made has petitioner referring to herself as "your friend and counselor" (R.353) because she and petitioner were once at a battered woman's shelter.

erns. The search warrant was for drugs and a small caliber semiautomatic handgun. In the ensuing search, officers found such a gun, a small quantity of marijuana, a small quantity of methamphetamine from a woman's purse, and some drug paraphernalia. Petitioner and Jacobs were arrested. The Cotherns were released.

They were separately tried. Jacobs was tried July 13-14, 1993, and he was convicted on all counts and sentenced by a jury to a total of 116 years imprisonment and $120,000 in fines. His conviction was affirmed on July 5, 1994. *Jacobs v. State*, 317 Ark. 454, 878 S.W.2d 734 (1994).

Petitioner was tried on November 1 & 4, 1993. Her defense to the controlled buys was entrapment. Ark. Code Ann. § 5-2-209 (1987). She also moved to dismiss the charges against her because the police, when they knew she was represented by counsel, sent a wired informant into her jail cell to engage her in an incriminating conversation. She also moved to suppress the result of the search of her house on four grounds, but she waived two after the proof was in. The remaining grounds were: (1) an alleged *Franks v. Delaware*, 438 U.S. 154 (1978), violation in the affidavit for the warrant, and (2) the failure of the officers to knock-and-announce their identity and purpose before the search. The motions were denied, and she went to trial.

The jury rejected the entrapment defense and convicted her of the two controlled buy counts where the informant was corroborated by the officer listening on a body mike. The jury acquitted her, however, of the uncorroborated controlled buy. As for the product of the search, she was convicted of felony possession of drug paraphernalia but only of misdemeanor possession of marijuana, the jury reducing the charge, and she was acquitted of possession of methamphetamine with intent to deliver the drugs allegedly found in her purse. She was sentenced by the jury to a total of 31 years imprisonment and fined $11,000.

Her conviction was affirmed on appeal by the Arkansas Supreme Court on July 11, 1994. *Wilson v. State*, 317 Ark. 548, 878 S.W.2d 755 (1994).

B. Facts and probable cause leading up to the obtaining the search warrant

The facts, stated in the light most favorable to the prosecution, are as follows:

In 1992, petitioner, Sharlene Wilson, lived at 534 Oaklawn Street in Malvern, Arkansas with her boyfriend and soon-to-be husband Bryson Jacobs. The Arkansas Seventh Judicial District Drug Task Force[3] (DTF) was working an informant, Joann Potts, who had been arrested (but not charged) along with her husband for selling drugs, and the Potts' truck had been seized for forfeiture. J.A. 33-35. She was working their way out of that predicament by acting as an informant, and she was even paid for her services. J.A. 35.[4]

The DTF had information of suspicious comings-and-goings at the house for months, and they had surveilled the house for awhile. Thus, the occupants of the house were targeted for investigation. J.A. 36.

Det. Henry Efird testified at the suppression hearing that Potts was sent into the Jacobs-Wilson house several times to attempt to make buys, sometimes while she was working for other officers, but she admittedly failed to make any buys. R. 356. Petitioner was not always there on the when she went in. J.A. 36-37.

1. *November 22, 1992 charge*. The affidavit for the arrest warrant, however, only refers to Potts first having been in contact with Jacobs on November 22, 1992 about her purchasing some marijuana from him. Nevertheless, on that occasion, Potts was searched, equipped with a body mike transmitter, given $120 for the buy, and then sent into the house. Efird listened to and recorded the conversations and transaction. He heard Potts buy one-half ounce of marijuana from Jacobs for $70, and he heard Jacobs making her change. Potts left the house and met with the officer where she handed him the drugs and the $50 remaining. J.A. 7.[5] This became count 1 of CR93-1-1. J.A. 5-6.

2. *November 23, 1992 charge*. The next day, she was again wired and sent into the house to make another controlled buy; this time of methamphetamine. And again, Potts went in while Efird remained in a car listening to and recording the conversations. He could hear Jacobs and petitioner talking, and he could hear Jacobs talking to Potts about the quality of the methamphetamine. Jacobs sold the informant four packets for $100, which she turned over to Efird. J.A. 8. This became count 2 of CR93-1-1. J.A. 6.

3. *December 30, 1992 charge*. According to the affidavits for the arrest warrant and the search warrant (J.A. 15-16 & 50-51 (DX 2), respectively), the next apparent contact between Potts and Jacobs and Wilson occurred on December 30, 1992 where Potts called the house and talked to Jacobs. She asked if they had any drugs to sell, and Jacobs said that they did. She was told to call back in about ten minutes when petitioner would be back. J.A. 15, 50.

Potts called back 25 minutes later and petitioner answered. Potts asked if petitioner had any marijuana to sell, and petitioner said that she did. Petitioner told Potts to meet her in five minutes at a convenience store in Malvern. Potts was

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[3] The Seventh Judicial District is comprised of Saline, Grant, and Hot Spring Counties. Malvern is the county seat of Hot Spring County, and it is 45 miles southwest of Little Rock.

[4] She was paid for drug buys from twelve to fifteen persons (J.A. 43), and she made six cases. R. 348. Ultimately, her husband "took [her] charges" and she was not convicted of anything. R. 361.

[5] At the trial, Potts admitted taking her infant daughter along on some of her drug deals in this case and others, as well as those prior to her becoming an informant. R. 349.

then searched by Efird and given $40 in buy money. Efird set up surveillance at the store to await their arrival. This time the informant was not wired nor was her vehicle searched. J.A. 15, 50.

Shortly thereafter, petitioner arrived in her pickup truck, and the informant got in. The informant later told Efird that petitioner asked her if she was working for the police. Potts said she denied it, and petitioner allegedly threatened her if she was. She said petitioner also made her lift her shirt to look for surveillance equipment. Potts then allegedly gave petitioner $40 for a quarter ounce of marijuana priced at $35. Petitioner did not have the $5 change, so they drove together to yet another store to get change. *Id.* En route, petitioner allegedly showed Potts a small chrome plated semi-automatic pistol and threatened her if she was working for the police. J.A. 16, 50.[6] When they returned to the first store, Potts got into her vehicle, and they both drove off. Potts met Efird and gave him the marijuana and the $5 change. *Id.*

The drug charge became count 1 and the "terroristic" use of the weapon became count 2 of CR93-68-1.

C. Issuance of the arrest and search warrants

On December 31, 1992, DTF officers had prepared several arrest warrants and search warrants to be executed that day for various persons, including petitioner and Jacobs. Circuit Judge John W. Cole issued arrest warrants for Jacobs and petitioner in CR93-1-1 (filed December 31, 1992) for delivery of marijuana and methamphetamine. Judge Cole also issued the search warrant for their house based on the events related by the informant allegedly occurring the day before. J.A. 46-48. The search warrant was prepared from a form on a computer, and there were items on the warrant to be checked by the judge, which he did.

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[6] *But see* R. 355 where she equivocates on the supposed threat.

The search warrant provides, in part, as follows:

> Description of person, place or thing to be searched: A white framed house located at 534 Oaklawn Street in Malvern, Hot Spring County, Arkansas.
>
> Scope of the search granted: Includes the premises, curtilage and vehicles of 534 Oaklawn Street in Malvern, AR.

J.A. 46. Specifically, the warrant authorized a search for "illegal narcotics . . . and a small caliber pearl handled weapon . . . ." *Id.* In addition, the judge specifically found there were no exigent circumstances: no probable cause for a nighttime search, no risk of destruction of evidence, and no risk to the officers in the search:

> This warrant shall be executed within 60 days of the date issued and returned to the issuing Judicial Officer within 5 days of its execution unless shorter period(s) of time indicated:
> (✓) Executed within 3 days of date issued (not more than 60)
> (✓) Return within 5 days of date executed (not more than 5)
> (Choose One)
> (✓) This warrant shall be executed between the hours of 6:00 a.m. and 8:00 p.m.
> or
> ( ) I find reasonable cause to believe that:
> ( ) the place to be searched is difficult of speedy access.
> ( ) the objects to be seized are in danger of imminent removal.
> ( ) the warrant can only be safely or successfully executed at nighttime or under circumstances the occurrence of which is difficult to predict with accuracy and authorize the execution of this warrant at any time, day or night . . . .

J.A. 47-48. Indeed, the issuing magistrate could not have issued a nighttime warrant under Arkansas law because there

was no showing of need for one in the affidavit for the search warrant. Ark.R.Crim.P. 13.2(c) (1993).[7]

D. Execution of the arrest and search warrants

About 5 p.m., December 31, 1992, the DTF officers and a uniformed officer, with the Prosecuting Attorney in tow, arrived to serve the warrants. Det. Roger Walls held the search warrant, and he was one of the first two officers in:

> Q Do you know if the door was locked?
> A No.
> Q Myself and Deputy Smith went up on the porch. I had the warrant. He was the uniformed officer. The prime door was open, the screen door was shut. We could see people in the living room. We identified ourselves as police officers and told them we had a search warrant and entered while we were doing that.
> Q People just sitting around on the couch?
> A There was, as we come upon the porch, Mr. Jacobs was standing in the middle of the living room floor facing away from us and he's the person that—
> * * *
> A And we entered the house upon announcement.

J.A. 41-42.

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[7] The rule against nighttime searches is so important in Arkansas, that many cases have suppressed nighttime searches as a result of the requesting officers' failure to specify probable cause for them or because the magistrate merely checked a clause permitting nighttime searches on a form without any proper showing having been made for one. *See, e.g., Hall v. State,* 302 Ark. 341, 789 S.W.2d 456 (1990); *Garner v. State,* 307 Ark. 353, 820 S.W.2d 446 (1991). The nighttime search rule so vital to Arkansas jurisprudence that the good faith exception does not apply to clear violations of the rule; *Richardson v. State,* 314 Ark. 512, 519, 863 S.W.2d 572, 576 (1993); and most violations have been found to be clear because the law is so well settled in Arkansas.

The search produced a small caliber handgun similar to the one petitioner allegedly used to threaten the informant on December 30, 1992, some ammunition, a 16 gauge shotgun, some suspected marijuana and methamphetamine, alleged records of drug transactions, and some drug paraphernalia.

Petitioner and her husband were arrested. The other couple in the house, the Cotherns, were released.

E. The motion to suppress and the hearing

Petitioner filed her motion to suppress on July 22, 1993. It was heard the first day of trial, a Friday. When the issue was to be heard, however, the motion inexplicably was not in the clerk's file (J.A. 29), but it was listed on the docket sheet. J.A. 1, 4. Also, defense counsel did not have a copy of it in hand on the first day of trial, so counsel argued the issues from memory. J.A. 29-31. (Counsel's copy of the motion was presented to the court when the trial resumed on Monday, and then included in the file.) The issues were tried to conclusion, and the trial court ruled that the search was valid without making specific findings, stating only that the "[m]otion to suppress is denied." J.A. 45.

Ironically, the written motion to suppress did not include the knock-and-announce issue. J.A. 17-18. However, the issue was orally presented to the trial court, the court and the parties considered the issue properly before the court, it was fully litigated by agreement and without objection, and the trial court ruled on it. Finally, the Arkansas Supreme Court addressed this issue on the merits, never questioning whether the issue was properly preserved for appeal. J.A. 77; *Wilson v. State,* 317 Ark. 548, 554, 878 S.W.2d 755, 758 (1994).[8]

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[8] At no time has the respondent nor the courts below ever questioned whether this issue was properly before the courts. Petitioner mentions this situation just in case somebody raises the question that the question presented is not properly before the court, because it is. *See, e.g., Steagald v. United States,* 451 U.S. 204, 208-11 (1981)

III. THE CHARGES FILED AGAINST PETITIONER AND JACOBS AND THEIR DISPOSITION

Petitioner and Jacobs were charged together in three separate case numbers. They were tried separately.

A. *CR93-1-1:* The charges in the arrest warrant became case number CR93-1-1, as follows:

Count 1: Both defendants delivered marijuana to an informant for $70 on November 22, 1992, a class C felony.[9] J.A. 5. Both were convicted of this count. Petitioner was sentenced to six years by the jury. J.A. 19. Jacobs was sentenced to 10 years and fined $25,000.

Count 2: Both defendants delivered methamphetamine to an informant for $100 on November 23, 1992, a class Y felony.[10] J.A. 6. Both were convicted of this count; petitioner receiving 25 years from the jury (J.A. 20) and Jacobs 40 years and fined $25,000.

Jacobs was charged as an habitual offender with "more than one but less than four" prior felony convictions.[11] By amendment to the information, petitioner was similarly

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(government could not acquiesce in defendant's standing to challenge a search throughout the litigation and then assert in this Court for the first time that the defendant lacked standing).

[9] Because of petitioner's prior convictions, a class C felony was punishable by 6-20 years imprisonment and/or a fine. Ark. Code Ann. § 5-4-501(a)(4) (1987). (This was amended in 1993 to lower the minimum by half. *Id.* § 5-4-501(a)(4) (Supp.1993).)

[10] Because of petitioner's prior convictions, the range of punishment for a class Y felony of delivery of a schedule I drug as 20-60 years or life imprisonment. Ark. Code Ann. § 5-4-501(a)(1) (1987). (This was amended in 1993 to lower the minimum by half. *Id.* § 5-4-501(a)(1) (Supp. 1993).)

[11] Arkansas law recognizes two levels of habitual offender status: "more than one but less than four" and "four or more" priors. Ark. Code Ann. § 5-4-501 (1987 & Supp.1993).

charged with having "less than four" prior convictions for hot checks and forgery. J.A. 9.

B. *CR93-63-1:* The search of the house produced three counts against both petitioner and Jacobs and a fourth against Jacobs. The counts of the information are listed at J.A. 11:

Count 1: Both defendants possessed methamphetamine and hydromorphone with intent to deliver as a result of the search of the *woman's purse.* This is also a class Y felony. Petitioner was acquitted of this count; J.A. 21; but Jacobs was convicted and sentenced to 40 years and fined $25,000.

Count 2: Both defendants possessed marijuana with intent to deliver, a class C felony. Petitioner was convicted of this count, but the jury reduced it to only misdemeanor possession because of the state's apparent failure to prove intent to deliver of the small amount of marijuana found in the house. She was sentenced to one year in the County Jail and a $1,000 fine.[12] J.A. 21. Jacobs, however, was convicted of the felony and sentenced to 10 years and fined $10,000.

Count 3: Both defendants possessed drug paraphernalia, a class C felony. Both were convicted. Petitioner only received a $10,000 fine. J.A. 22. Jacobs was sentenced to 10 years and fined $10,000.

Count 4: Jacobs was a felon in possession of a firearm, a class D felony, and he was convicted and sentenced to 6 years and a $10,000 fine.

Thus, the search and seizure before the Court only involves petitioner's conviction on the drug paraphernalia charge and the misdemeanor marijuana conviction.[13]

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[12] Under Arkansas law, the jail time for the misdemeanor conviction merges into the felony time; Ark. Code Ann. § 5-4-403(c)(1) (1987 & Repl.1993); but the fine does not.

[13] Jacobs did not raise the knock-and-announce issue in his case, and he received 66 years imprisonment and $70,000 in fines as a result of convictions from the search of his house.

C. *CR93-68-1:* The controlled marijuana buy of December 30, 1992 produced two counts against petitioner:

Count 1: Delivery of marijuana to the informant, a class C felony. J.A. 13-14. Petitioner was acquitted on this count. J.A. 23.

Count 2: Terroristic threatening, a class D felony, for allegedly threatening the informant. J.A. 14. (This count disappeared without any trial.)

IV. THE APPEAL TO THE ARKANSAS SUPREME COURT

The Arkansas Supreme Court affirmed petitioner's appeal on July 11, 1994. *Wilson v. State,* 317 Ark. 548, 878 S.W.2d 755 (1994). She raised three issues: (1) police misconduct of sending a wired informant into her jail cell to get petitioner to incriminate herself at a time when petitioner was represented by counsel and awaiting trial in Circuit Court warranted dismissal of charges, notwithstanding a lack of prejudice; (2) a material omission from the affidavit for the search warrant in violation of *Franks v. Delaware, supra;* and (3) the police failure to knock-and-announce their presence prior to entry violated the Fourth Amendment. The first two issues are not involved in the petition for certiorari.

On the knock-and-announce issue, the Arkansas Supreme Court held:

> As an additional ground for suppression of the fruits of the search, Ms. Wilson submits the officers executing the search failed to knock and announce their identity before entering the residence. The testimony indicated that the officers entered the home while they were identifying themselves. Ms. Wilson relies upon *Miller v. United States,* 357 U.S. 301, 78 S.Ct. 1190, 2 L.Ed.2d 1332 (1958), as the sole authority for her argument.[14] The appellant contends, based upon *Miller,* that the Fourth Amendment requires officers to knock and announce prior to entering the residence. However, *Miller* involved a statute, 18 U.S.C. § 3109, which specified that a law enforcement officer, executing a search warrant, may break open a door only if, "after notice of his authority and purpose," he is denied admittance. The Fourth Amendment was not mentioned.
>
> There is no authority for Ms. Wilson's theory that the knock and announce principle is required by the Fourth Amendment. Furthermore, Ark.R.Crim.P. 13.3 outlines the procedure to be followed in the execution of a search warrant, and provides in part:
>
> > (e) The executing officer, and other officers accompanying and assisting him, may use such degree of force, short of deadly force, against persons, or to effect entry or to open containers as is reasonably necessary for the successful execution of the search warrant with all practicable safety.
>
> Rule 13.3 does not contain a "knock and announce" rule. *See also Dodson v. State,* 4 Ark.App. 1, 626 S.W.2d 624 (1982) (Glaze, J., concurring), *cert. denied,* 457 U.S. 1136, 102 S.Ct. 2966, 73 L.E.2d 1355 (1982).

Wilson, 317 Ark. at 554, 878 S.W.2d at 758 (footnote added).

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[14] With all due respect, this is not correct. Petitioner also cited *Ker v. California,* 374 U.S. 23 (1963), and *Sabbath v. United States,* 391 U.S. 585 (1968), in her brief in the Arkansas Supreme Court at 52-53.

SUMMARY OF THE ARGUMENT

The common law knock-and-announce rule is so fundamental to our constitutional system that it must be considered a part of the reasonableness clause of the Fourth Amendment. Therefore, the Fourth Amendment requires that law enforcement officers executing arrest or search and seizure warrants knock-and-announce before entry, unless entry is otherwise excused by exigent circumstances.

I. The adage that "every man's home is his castle" is an elementary part of the common law. Thus, "physical entry of the home is the chief evil of against which the wording of the Fourth Amendment is directed."

The policies of the knock-and-announce rule recognized at common law and today are: (1) protection of fundamental privacy interests in the home by (a) permitting the target of the search to surrender his or her privacy under the processes of the law, and (b) granting the police and householder an opportunity to avoid searches of the wrong place or arrests or searches of otherwise innocent persons; (2) protection against violence by startled householders or nervous police officers waving guns during a volatile situation that invites the use of deadly force; and (3) protection against unnecessary destruction of private property. These policies protect the innocent and guilty alike. The second also protects the safety of police officers.

II. The common law rule of knock-and-announce is usually stated to have arisen from *Semayne's Case* in 1603. Actually, it derives from a 1275 statute which is stated in *Semayne's Case* to be but a codification of the common law.

III. The knock-and-announce requirement existed in at least ten states by the time the Fourth Amendment was adopted. The same Congress that referred the Bill of Rights to the states adopted the Judiciary Act of 1789 which required federal officers to comply with the law of the states in which they were operating. Congress must have known that this meant that federal officers were governed by the notice requirement.

The federal knock-and-announce statute, 18 U.S.C. § 3109, was adopted in 1917, and it is based on a New York statute from 1782. When the Court construed § 3109 in *Miller v. United States* in 1958, it held that the statute was but a codification of the common law rule.

The knock-and-announce requirement is the law in at

least 41 states and all federal jurisdictions either by statute or case law. *See* Appendices A-E.

IV. The common law has long provided significant guidance in determining what the Framers of the Fourth Amendment intended. Based on settled law at the time, the Framers would not have sanctioned this search.

V. The policies of the knock-and-announce rule recognized at common law are still valid today. They are: (A) protection of fundamental privacy interests in the home by (1) permitting the target of the search to surrender his or her privacy under the processes of the law, and (2) granting the police and householder an opportunity to avoid searches of the wrong place or arrests or searches of otherwise innocent persons; (B) protection against violence by startled householders or nervous police officers during a highly charged situation that invites the use of deadly force; and (C) protection against unnecessary destruction of private property.

The second interest is of particular importance. Common law and statute recognize the right of householders to use deadly force against those entering the premises. Innocent citizens and raiding police officers have been seriously injured and killed during unannounced raids.

VI. The three common law exceptions to the knock-and-announce rule will still be recognized if petitioner prevails. In this case, however, the state asserted no exception to the knock-and-announcement, and the search warrant itself and the manner of execution of the warrant show that there was no exigency.

ARGUMENT

THE COMMON LAW KNOCK-AND-ANNOUNCE RULE IS SO FUNDAMENTAL TO OUR CONSTITUTIONAL SYSTEM THAT IT MUST BE CONSIDERED A PART OF THE REASONABLENESS CLAUSE OF THE FOURTH AMENDMENT. THEREFORE, THE

FOURTH AMENDMENT REQUIRES THAT LAW ENFORCEMENT OFFICERS EXECUTING ARREST OR SEARCH AND SEIZURE WARRANTS KNOCK-AND-ANNOUNCE BEFORE ENTRY, UNLESS ENTRY IS OTHERWISE EXCUSED BY EXIGENT CIRCUMSTANCES.

I. INTRODUCTION

One of the hallmarks of our common law form of government is respect for personal privacy. The sanctity of the home in the law has been deeply respected since Roman times.[15] The American colonists went to war against England at least in part because of the abuses heaped upon them by Crown appointed ministers and governors who failed to adequately respect fundamental personal privacy.

The knock-and-announce rule is a part of that fundamental value of personal privacy and freedom from governmental intrusion. Recognition of the knock-and-announce rule arose in England at least as early as 1275, and, at the

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[15] *See* 1 CUDDIHY, *infra,* at xciii-xciv:

> The Romans had similar concerns, as Cicero revealed in 57 B.C. when he spoke of each citizen's home as "sacred . . . hedged about by every kind of sanctity." Under the code of Emperor Justinian of Byzantium (533 A.D.), a freeman could not even be summoned from his house, for that code acknowledged it as "everyone's safest place, his refuge and his shelter."
>
> The British roots of the amendment are especially deep. Britons have proclaimed their houses to be their castles since at least the early fourteenth century. In exonerating a citizen whose neighbors had defended his home against invasion by his enemies, Chief Justice John Fineux of the Court of King's Bench held in 1505 that "the house of a man is for him his castle and his defense." Other judges expressed almost identical comments on three more occasions by 1616.

(footnotes omitted)

time of the adoption of the Bill of Rights, practically all of the new United States had a law requiring notice when law officers sought entry into the home.

Today, the federal government and at least forty-one states require announcement for entries to arrest and search either by statute, common law, or under the reasonableness requirement of the Fourth Amendment. *See* Appendices A-F. The requirement of notice and announcement has always been an integral part of the Anglo-American law of search and seizure. It is too late to contend that it is not a part of Fourth Amendment reasonableness.

A. The sanctity of the home is our most important privacy interest

The ancient maxim that "every man's home is his castle" has always been an elementary part of the common law. As William Pitt so eloquently stated in a Parliamentary debate in England about 1765:

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!

Pitt was quoted in *Miller v. United States,* 357 U.S. 301, 307 & n. 7 (1957), discussing the policy behind the federal knock-and-announce statute, 18 U.S.C. § 3109.

The entire premise of the Fourth Amendment was to

> protect the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specifically constitutional terms: "the right of the people to be secure in their . . . houses . . . shall not be violated."

Payton v. New York, 445 U.S. 573, 589 (1980). According-

ly, the Court has said that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States District Court for the Eastern District of Michigan,* 407 U.S. 297, 313 (1972), quoted in *Welsh v. Wisconsin,* 466 U.S. 740, 748 (1984). "[A]t the very core" of the Fourth Amendment "stands the right of a man to retreat into his own home." *Silverman v. United States,* 365 U.S. 505, 511 (1961). *Accord: Payton, supra,* at 584-85; *Soldal v. Cook County,* 113 S.Ct. 538, 543 (1992).

In addition, "[t]his court has held in the past that a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope . . . . 'The scope of the search must be strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Terry v. Ohio,* 392 U.S. 1, 17-18, 19 (1968). "The manner in which the [search] . . . [was] conducted is, of course, as vital a part of the inquiry as whether [it was] warranted at all." *Id.* at 28 (bracketed material added). This includes the knock-and-announce requirement.

B. This Court's protection of the privacy of the home

This Court has never taken physical entries into the home lightly, no matter how relatively slight the intrusion may appear on the surface. A few examples are:

1. *Camara v. Municipal Court,* 387 U.S. 523 (1967), holding that municipal code inspectors could not enter premises without a warrant to conduct a health inspection. There was no investigation of crime, yet the right of privacy was paramount to unjustified, unwarranted intrusions. The Court added that the householder had a right to know the purpose of the entry. *Id.* at 532.

2. In *Chimel v. California,* 395 U.S. 752, 763 (1969), the Court held that a search incident of an entire house was not justified under the Fourth Amendment. Similarly, the

Court held in *Mincey v. Arizona,* 437 U.S. 385 (1978), that officers on premises during the investigation of the killing of a police officer during a drug raid could not continue their search without a warrant.[16]

3. The Court long recognized "hot pursuit" as a common law exception to the warrant requirement because a suspect is not able to flee into his home to merely to avoid arrest. *Warden v. Hayden,* 387 U.S. 294 (1967); *United States v. Watson,* 423 U.S. 411 (1975). Time proved, however, that the gravity of the crime had some bearing on this issue. Thus, in *Welsh v. Wisconsin, supra,* the Court denied an officer in "hot pursuit" of a drunk driver the authority to enter the driver's home to arrest him, notwithstanding that the delay in getting an arrest or search warrant would result in the natural metabolic destruction of the evidence of drunk driving that the officer would need to prove the driver guilty.

4. The government in the enforcement of its tax laws has the power to seize real property, but it needs a warrant to enter a home. *G.M. Leasing Corp. v. United States,* 429 U.S. 338, 357-58 (1977).

5. The sanctity of the home is so great that even fire scene searches require a warrant when officers later search for evidence of the cause. *Michigan v. Tyler,* 436 U.S. 499 (1978). There is no assumption that even a suspected arsonist has abandoned a privacy interest in his home which would

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[16] Ironically, *Mincey* apparently arose in a warrantless knock-and-announce situation. One officer went into Mincey's house for a "buy-bust" where an undercover officer making a buy would leave the premises and then return with other officers who would make the arrest. Gunfire erupted when officers tried to force their way back in. A narcotics officer was killed, and Mincey was seriously wounded. Mincey was tried for murder of a law enforcement officer. His defense was that he did not know that he was shooting at an officer. *State v. Mincey,* 115 Ariz. 472, 566 P.2d 273, 278-80 (1977), *rev'd on other grounds,* 437 U.S. 385 (1978).

permit a warrantless entry to search for the cause of the fire. *Id.* at 505. Just as with Pitts' reference to a "ruined tenement," the Court in *Michigan v. Clifford,* 464 U.S. 287, 293 (1984), held that "reasonable expectations of privacy remain in the fire-damaged property."

6. The Court sanctioned the use of beepers to trace the movements of vehicles and things in public places in *United States v. Knotts,* 460 U.S. 276 (1983). The Court held, however, that once the object containing the beeper entered the privacy of the home, the police could no longer monitor it without a warrant because the threshold had been crossed. *United States v. Karo,* 468 U.S. 705, 714-18 (1984).

7. In *Arizona v. Hicks,* 480 U.S. 321 (1987), the Court held that while a police entry into Hicks' apartment to look for potential shooting victims was valid as an emergency entry, they did not have the authority to lift stereo equipment and look at serial numbers because that search exceeded the scope of the justification for the initial intrusion.

8. *Maryland v. Buie,* 494 U.S. 325 (1990), sustained a protective sweep of premises during an arrest. The Court cautioned, however, that a protective sweep had to be limited to merely looking through the premises for others who could attack the officers or aid the accused in an escape from arrest; they could not perform a search incident. *Id.* at 334-36.

9. In *Minnesota v. Olson,* 495 U.S. 91 (1990), the Court held that houseguests have a reasonable expectation of privacy sufficient to grant them standing to challenge a search of the premises. In so holding, the Court stressed our societal understandings. *Id.* at 100.

10. Similarly, physical seizure of a home was invalidated in *Soldal v. Cook County, supra,* a civil rights action, where an officer stood by and permitted a private citizen to remove a mobile home occupied by another from its underpinnings and take it away. The Court noted the weightier property in a persons home. *Id.* at 544 n. 7.

11. Drug forfeiture seizures of real property implicate the Fourth and Fifth Amendments. Such seizures, however, have too high a risk of error for innocent owners to be acceptable. *United States v. James Daniel Good Real Property,* 114 S.Ct. 492 (1993). So, too, does the failure to announce.

II. THE COMMON LAW AND KNOCK-AND-ANNOUNCE

The common law authorities on this issue have been recounted numerous times; twice in the opinions of this Court in *Miller* and *Ker* and in the opinions of numerous other courts. Therefore, petitioner will not restate what has already been written. Instead, petitioner makes some observations about what those and other authorities further stated which seems to have been overlooked over the years. Furthermore, petitioner submits that the knock-and-announce rule really dates from a 1275 English statute. Thus, the common law rule is at least 720 years old, not just a mere 392.

A. *Semayne's Case* (1603) and the statute it relies on

The earliest reported case which stated the common law knock-and-announce rule is *Semayne's Case,* 5 Co.Rep. 91a, 77 Eng. Rep. 194 (K.B.1603). It is often cited, but those doing so apparently only quote the excerpts in prior cases and do not go to the case itself. For example, *Miller v. United States, supra,* at 308, and *Ker v. California, supra,* at 47 (BRENNAN, J., concurring), both only quote the following (5 Co.Rep. at 91b, 77 Eng.Rep. at 195):

> In all cases where the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K(ing)'s process, if otherwise he cannot enter. *But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors* * * *.

(Emphasis in *Miller*) The ellipsis, however, includes the fol-

lowing significant and usually omitted language:

> . . . and that appears well by the stat. of Westm. 1. c. 17. (which is but an affirmance of the common law) as hereafter appears, for the law without a default in the owner abhors destruction or breaking of any house (which is for the habitation and safety of man) by which great damage and inconvenience might ensue to the party, when no default is in him; for perhaps he did not know of the process, of which, if he had notice, it is to be presumed that he would obey it, and that appears by the book in 18 E. 2. where it is said, that the K's officer who comes to do execution, &c. may open the doors which are shut, and break them, if he cannot have the keys; which proves, that he ought first to demand them, 7 E. 3.

Why this language is always omitted in the case and articles is inexplicable—it further proves that the knock-and-announce rule predates *Semayne's Case* by 328 years. Also, it was statutory and the statute was based on the common law.

The statute referred to, Westminster 1, ch. 17, is reprinted in COKE'S INSTITUTES; SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND ch. 17, at 192-93 (1797). In the notes at the beginning of Coke's chapter 17, it is stated that this statute was passed in the third year of the reign of Edward I, and it is found in 1 STATUTES AT LARGE, FROM THE MAGNA CARTA TO THE END OF THE ELEVENTH PARLIAMENT OF GREAT BRITAIN, ANNO 1761, 3 Edw. I, ch. 17 (D. Pickering ed. 1762), and it was adopted in 1275. It is submitted that this statute is the first clear expression of the first knock-and-announce rule.[17] It states that the sheriff had make a "solemn demand[ ]" before entry to those allegedly in possession of the "beasts of another . . . [who] cause[d] them to be driven into a castle or fortress" and that the person in possession "shall be admonished to make deliverance by the

[17] Cuddihy's dissertation (cited in Part III.B., *infra*) does not mention this statute in the relevant time period. There is, however, no table of statutes in his work to be certain it is omitted.

sheriff or bailiff . . . or . . . he may be conveniently warned by the taker, or by any other to make deliverance . . . ."

It is also sometimes stated that the knock-and-announce language of *Semayne's Case* is mere dicta. *Amici curiae* in support of petitioner do, and presumably so will respondent and its *amici*. Petitioner strongly disagrees; *Semayne's Case* held that it was only restating what a statute codifying the common law already required. It is, therefore, hardly mere dicta.

B. Sir Matthew Hale (1687)

A decade after his death, Sir Matthew Hale's PLEAS OF THE CROWN was published in 1687. Hale wrote, with added notes provided by the editors of the First American edition in 1847,[18] at 116-17:

> If a justice of the peace issues a warrant to apprehend a felon, who is in his own house, and after notice of the warrant and request to open the door it is refused or neglected to be done, the officer may break open the door to take him [20] and the same law is, if it be but for suspicion of felony. 13 *E.* 4. 9. *a.* 5 *Co. Rep.* 91. *b. Semain's* case.(*)
>
> [20] But only upon strong necessity and after notice. *Curtis'* case, *Foster,* 135; 2 *Hawk. ch.* 14, § 1; *Lannock v. Brown,* 2 *B. & Ald.* 592. See *Burdett v. Abbott,* 14 *East.* 163; *State v. Smith,* 1 *N. Hamp.* 346; *Bell v. Clap,* 10 *Johnson,* 263; *State v. Shaw,* 1 *Root,* 134; *Kelsey v. Wright,* 1 *Root,* 83.
>
> (*) *Part* I, *p.* 572.
>
> And so much more may he break open the house of another person to take him, for so the sheriff may do upon a civil process. 5 *Co. Rep.* 93. *a. Semain's* case. But then he must at his peril see that the felon be there, for if the felon be not there, he is a trespasser to the stranger whose house it is;

[18] The First American edition was published by the Clerk of the U.S.Dist.Ct., E.D.Pa., by order of an act of Congress.

but in both cases the officer must first notify his business that he comes about, and demand admission. *Ibidem.*

But in case of warrants to search for stolen goods I think the doors of any person cannot be broken up.

If a warrant of the peace issue from a justice of the peace, the officer or minister of such warrant may break open a door in case of a refusal to open after demand of notice of his business ruled by *Popham* and *Clerk* 3 *Jac. Dalt. cap.* 78, *p.* 204, 205.

C. William Hawkins (1721)

Shortly thereafter, Hawkins published 2 WILLIAM HAWKINS, A TREATISE ON PLEAS OF THE CROWN ch. 14, § 1, at 86-87 (1721), and he stated the rule as "no one can justify the breaking open of another's Doors to make an Arrest, unless he first signify to those in the House the Cause of his coming, and requests them to give him Admittance."

D. *Curtis's Case* (1757)

In 1757, the rule in *Semayne's Case* was applied to a criminal case in *Curtis's Case,* 1 Fost. 135, 168 Rep.Rep. 67 (K.B.1757). Curtis was tried for murder for killing an officer with the blow of an ax to the head as the officer was entering Curtis' house to arrest him on a warrant for escape. The court discussed the holding in *Semayne's Case:*

> The 9 [of 11] judges were of the opinion that no precise form of words is required in a case of this kind. It is sufficient that the party hath notice, that the officer cometh not as a mere trespasser but claiming to act under a proper authority; and if, after this notice, he be resisted, and he or any of his assistants killed in consequence of such resistance, it will be murder; provide it cometh out in evidence that the officer had a legal warrant.

Id., 1 Fost. at 136-37, 168 Eng.Rep. at 68 (bracketed material added). Thus, it may not be murder to kill an officer illegally entering without notice or a warrant.

E. Foster, Coke, Blackstone, and Chitty

Other significant common law authorities recognizing the knock-and-announce rule in substantially similar language prior to the adoption of the Fourth Amendment are: FOSTER, CROWN LAW 323; 4 COKE, INSTITUTES *177; 3 BLACKSTONE, COMMENTARIES *412. A significant post-Fourth Amendment authority is 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW ch. 2, at 52-56 (1816).

III. THE DEVELOPMENT OF THE LAW OF KNOCK-AND-ANNOUNCE IN THE UNITED STATES

A. Historical introduction

Writs of assistance were issued to enforce the customs laws in Massachusetts practically without any legal or moral restraint. The writs created great resentment in the colonists against the governmental power of search and seizure.[19] But, even the infamous writs of assistance were executed with notice to the target of the search. *Ker v. California,* 374 U.S. 23, 52 (1963) (BRENNAN, J., concurring).

James Otis's famous argument in court against the abuse of search and seizure in 1761,[20] as recounted by John Adams fifty years later, "breathed into the nation the breath of life." 2 LEGAL PAPERS OF JOHN ADAMS 122 (1965). The seeds of the American Revolution were sown.

B. The first federal knock-and-announce requirement was adopted by incorporation of state statu-

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[19] N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 55-59 (1937); J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 31-35 (1966).

[20] RAVITCH, THE AMERICAN READER 10-11 (1990). Otis' argument is recounted in all modern treatises and is discussed in *Boyd v. United States,* 116 U.S. 616, 624-25 (1886).

tes requiring announcement in the Judiciary Act of 1789.

1. Pre-Fourth Amendment state statutes requiring notice and announcement

The dissatisfaction with the way English governors and magistrates permitted general searches caused all the states to pass their own search and seizure statutes, have search and seizure provisions in their constitutions, or both. Accordingly, before the Fourth Amendment was even referred to the states, at least ten of the thirteen states had statutes requiring notice and announcement before execution of warrants. In addition, federal officers were required to follow the law of the states in which they were operating. Finally, it was also the recognized practice for justices of the peace. 2 W. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING, 602-1791, at 1511-13 (1990) (unpublished doctoral dissertation; Claremont (Cal.) College):

> Unannounced searches were probably a third category of the unreasonable processes that the Fourth Amendment forbade. In most states, custom, practice, or legislation required searchers to request admittance into a house and break in only if they had to.
>
> Every legal manual for American justices of the peace between 1788 and 1791 forbade unannounced, forcible entry to accomplish an arrest. American printers provide only three such manuals: *Conductor Generalis*, which appeared at New York, *The South Carolina Justice*, and a similar book for North Carolinians. Quoting Hawkins, however, the first two of these three books declared unequivocally
>
> > that no one can justify the breaking open of another's doors to make a arrest, unless he first signify to those in the house the cause of his coming and [request] them to give him admittance.
> >
> > Legislation and custom also curtailed the use of force in executing search warrants, whether general or specific. The statutes and legal manuals of at least seven states permitted forcible entry only after a householder had refused to admit a searcher under circumstances that included smuggling, counterfeiting, and trading with the enemy. In another state, Virginia, the impost of 1787 allowed forcible entrance only "when it may be necessary." New Hampshire and Pennsylvania provided a third variation by enacting warrants to force open specific houses where officers had been refused entrance without a warrant. In one way or another, at least ten states required a searcher to think twice before kicking in a door.
> >
> > Neither the Collection Act nor the Excise Act took a position on "no-knock" entries of private dwellings by federal officers. The Judiciary Act of 1789, however, effectively renounced those entries by requiring such officers to accomplish seizures and arrests through the usual legal processes of their resident states.
>
> (footnotes omitted)

2. Congress' adoption of state announcement law by reference in 1789

Congress must be presumed to have knowledge of all these state statutes in existence at the time that it referred the Bill of Rights to the states,[21] particularly in light of the fact that the First Congress also required federal customs officers to follow state search and seizure law.[22] As already stated, the Court held in *Boyd, supra*, at 623, that search and seizure laws passed in that First Congress "which proposed for adoption the original amendments to the Constitution" expressed

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[21] *See McDonald v. Hovey*, 110 U.S. 619, 628 (1884) (part of Judiciary Act of 1789 which follows English law would be given construction of English courts).

[22] The Judiciary Act of 1789 was passed by in the First Session of the First Congress, ch. 20, § 33 (Sept. 24, 1789), 1 Stat. 91.

Congress' intent as to what was a "reasonable" search.[23]

Therefore, the requirement of notice and announcement was incorporated into federal law in 1789 by statute before the Fourth Amendment was even adopted, and this must have been a fundamental part of what was a "reasonable" search.

C. Early state cases

In addition to the statutes in effect in 1789 discussed in Part III.B.1, *supra,* early state cases also applied the knock-and-announce rule. *See* discussion in Wilgus, *Arrest Without a Warrant,* 22 MICH.L.REV. 798, 802 (1924), summarizing these cases as follows:

> Before doors are broken, there must a necessity for so doing, and notice of the authority and purpose to make the arrest must be given and a demand and refusal of admission must be made, unless this is already understood, or the peril would be increased.

See also 2 CUDDIHY, *supra,* at 1344-45.

D. Federal laws on knock-and-announce

1. 18 U.S.C. § 3109

Congress mandated that federal law enforcement officers knock-and-announce since 1917, and, by reference to state law, 1789.

18 U.S.C. § 3109, passed in 1917, provides as follows:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the

[23] This was noted in *Carroll v. United States,* 267 U.S. 132, 150 (1925), and *United States v. Ramsey,* 431 U.S. 606, 617-18 (1977).

warrant.

2. The common law under 18 U.S.C. § 3109

In *Miller v. United States,* 357 U.S. 301 (1958), the Court dealt with whether District of Columbia narcotics officers complied with § 3109 in the course of making an arrest. The Fourth Amendment claim was not raised. The Court discussed the common law notions of privacy protected by § 3109, and held that the officers failed to comply.

The Court started with the discussion in *Accarino v. United States,* 85 U.S.App.D.C. 394, 179 F.2d 456 (1949), which noted the common law rules limiting the authority of officers to enter a home to make an arrest. *Miller,* 357 U.S. at 306-08. The Court separately discussed the common law limits on the power of entry to make an arrest:

> Whatever the circumstances under which breaking a door to arrest for felony might be lawful, however, the breaking was unlawful where the officer failed first to state his authority and purpose for demanding admission. The requirement was pronounced in 1603 in *Semayne's Case,* 5 Coke Co.Rep. 91a, 11 E.R.C. 629, 77 Eng.Repr. 194, at 195: "In all cases where the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K(ing)'s process, if otherwise he cannot enter. *But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors* * * *." (Emphasis supplied.)
>
> The requirement stated in *Semayne's Case* still obtains. It is reflected in 18 U.S.C. § 3109, in the statutes of a large number of States, and in the American Law Institute's proposed Code of Criminal Procedure, § 28.

Id. at 308-09 (footnotes omitted).

The Court found that the officers failed to announce as required by the statute and reversed.

> The rule seems to require notice in the form of an ex-

press announcement by the officers of their purpose for demanding admission. The burden of making an express announcement is certainly slight. A few more words by the officers would have satisfied the requirement in this case. It may be that, without an express announcement of purpose, the facts known to officers would justify them in being virtually certain that the petitioner already knows their purpose so that an announcement would be a useless gesture. Cf. *People v. Martin,* 45 Cal.2d 755, 290 P.2d 855; Wilgus, Arrest Without a Warrant, 22 Mich.L.Rev. 541, 798, 802 (1924). But even by that test the evidence upon which the Government relies was not sufficient to justify the officers' failure expressly to notify the petitioner that they demanded admission to his apartment for the purpose of arresting him.

The single fact known to the officers upon which the Government relies is the "split-second" occurrence in which the petitioner evinced "instantaneous resistance to their entry," an "almost instinctive attempt to bar their entry after they (the officers) had identified themselves as police * * *." It is argued that this occurrence "certainly points up that he knew their purpose immediately * * * (and), at once, realized that he had been detected and that the officers were there to arrest him"; that "(i)t would be wholly unrealistic to say that the officers had not made their purpose known because they did not more formally announce that they were there to arrest him."

Id. at 309-11.

Congress originally adopted the federal knock-and-announce statute in 1917, and it has an interesting and telling lineage. It is based on a 1782 New York statute which was based on the common law rule of *Semayne's Case*.

Section 3109 was originally adopted in two sections in the Espionage Act of 1917, Title XI, §§ 8-9, 40 Stat. 229 (enacted June 15, 1917), which provided:

> § 8. The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance.

> § 9. He may break open any outer or inner door or window of a house, for the purpose of liberating a person who, having entered to aid him in the execution of the warrant, is detained therein, or when necessary for his own liberation.

The language of this Act is not, and apparently never was intended to be, limited to espionage cases. In its cryptic Conference Report, the House of Representatives stated that the entire title on search warrants in the statute "was based on the New York law on this subject, and follows generally the policy of that law. It has been written into many provisions of the title as passed by the House."[24] The New York statute Congress was obviously referring to, indeed, the only one in effect at the time, was N.Y. Code Crim. Proc. §§ 799-800[25] adopted in 1881, and it is virtually restated in these sections.

The predecessor to that New York search and seizure statute was adopted nine years before the Fourth Amendment. N.Y. Stat., 5th session, ch. 39, § III (adopted April 13, 1782), N.Y. STATE LAWS 1777-84, at 480. It permitted a breaking to enter to execute a search warrant for "contraband goods" "if admittance shall be refused."[26]

3. Application of Espionage Act to Prohibition cases

Apparently the first case decided under the search and seizure provisions of the Espionage Act of 1917 was *Giles v. United States,* 284 F. 208, 209-12 (1st Cir.1922), which held

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[24] H.R. Conf. Rep. 65, 65th Cong., 1st Sess., at 20 (May 29, 1917).

[25] They are now codified as N.Y. Crim. Proc. Law § 690.50 (McKinney 1993).

[26] One of the most cited common law cases decided after the adoption of this statute, is *Bell v. Clapp,* 10 Johns. (N.Y.) 263, 265-66 (1813) (*per curiam*), that an officer may enter to execute a warrant only after announcing his identity and purpose.

that its search warrant provisions applied to searches under the National Prohibition Act, that era's version of the "war on drugs." In fact, the language of the statute apparently was considered applicable to all federal searches. *Id.* at 212.

And, this is just how it was construed thereafter.

4. The federal drug "no-knock" law and its repeal

In 1970, Congress felt that it could aid the "war on drugs" by granting the Justice Department one of its wishes: "no-knock" search warrants in drug cases.[27] Congress and the public were aware of the potential for abuses in no-knock warrant execution.[28] Nevertheless, the experiment began with the adoption of a no-knock provision in § 509(b) of the Comprehensive Drug Abuse, Prevention, and Control Act of 1970, Pub.L. No. 91-513, 84 Stat. 1236, 1274 (1970).[29]

By 1974, the abuses of the no-knock exception became legendary. Between 1970 and 1974, over 100 newspaper articles were inserted into the Congressional Record demonstrating the sordid abuses of no-knock warrant execution: while defending their homes, innocent householders shot and killed police officers and police officers shot and killed innocent householders, some of whom were doing virtually nothing and posing no threat to anyone.[30] In debates over the repeal of the federal no-knock law, the legendary Senator Sam Ervin argued that preapproved no-knock warrants violated the probable cause requirement of the Fourth Amendment.[31]

Congress finally voted to repeal the no-knock provision of the federal drug laws. Appropriations—Controlled Substances Act of 1974, Pub.L. No. 93-481, § 3, 88 Stat. 1455, 1456 (1974).[32]

The federal no-knock statute repeated the same abuses which led to the American Revolution: unbridled governmental power to invade the homes of citizens in certain types of cases leads to abuse of innocent citizens. There are adequate exceptions to the knock-and-announce requirement (*see* Part VI, *infra*), and a wily officer claiming an exception can easily create a de facto no-knock situation literally just be making it up. But, the policy of the common law rule of announcement was to protect against violence in announced police invasions of the home. The experience with no-knock laws shows that the threat to privacy and sanctity of the home still holds true.[33]

E. The Supreme Court's interpretations of knock-and-announce policy underlying the rule

This Court has directly addressed the knock-and-announce rule three times: *Miller v. United States,* 357 U.S.

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[27] *See generally* Note, *The Knock and Announce Rule: A New Approach to the Destruction of Evidence Exception,* 93 COLUM.L. REV. 685, 703-05 (1993); J. BOVARD, LOST RIGHTS 234-39 (1994).

[28] H.R.Rep. No. 907, 91st Cong., 2d Sess. 202 (1970), reprinted in 1970 U.S.C.C.& A.N. 4653-57 (stating the view opposed to adoption); Note, *Unannounced Entry to Search: The Law and the "No-Knock" Bill (S. 3246),* 1970 WASH.U.L.Q. 205.

[29] Congress also adopted a similar no-knock law for the District of Columbia. District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub.L. No. 91-358, § 210(a), 84 Stat. 473, 630 (1970) (repealed by Appropriations—Controlled Substances Act of 1974, Pub.L. No. 93-481, § 4, 88 Stat. 1455, 1456 (1974)).

[30] The Congressional Record references are cited in Note, *supra,* 93 COLUM.L.REV. at 705 n. 133.

[31] 120 Cong. Rec. 22,884 (1974), quoted in Note, 93 COLUM. L.REV. at 704.

[32] *See also* H.R. Conf. Rep. No. 1442, 93rd Cong., 2d Sess. 3 (1974), reprinted in 1974 U.S.C.C.& A.N. 5974, 5976-78.

[33] The current abuses of no-knock searches are recounted in BOVARD, *supra,* at 234-39.

301 (1957); *Ker v. California,* 374 U.S. 23 (1963); and *Sabbath v. United States,* 391 U.S. 585 (1968). It has not yet resolved the constitutional question in this case.

1. In an early case, one member of the Court assumed that some kind of notice was required. As early as 1948, Justice Jackson, concurring in *McDonald v. United States,* 335 U.S. 451, 460-61 (1948),[34] quoted in the text in Part V.B., *infra,* noted the great risk of violence in unannounced police entries to both citizens and officers.

2. *Miller* dealt with whether federal officers complied with 18 U.S.C. § 3109 in the execution of a search warrant. The Court held that § 3109 was a codification of the common law requirement of announcement, and the officers failed to comply with it. *Miller,* 357 U.S. at 308, quoted *supra.*

Ten years later, the Court held in *Sabbath* that officers failed to comply with the knock-and-announce requirement of § 3109 and held that "breaking" under the statute was to be interpreted under the common law definition of any physical entry. *Sabbath,* 391 U.S. at 589-91.

3. Five years after *Miller,* the Court in *Ker* did not reach a direct consensus on the constitutional question, apparently because the plurality felt that it did not have to. The plurality opinion held that the officers had exigent circumstances to dispense with the requirement of the warrant. *Ker,* 374 U.S. at 38-40, citing Wilgus, *supra,* 22 MICH.L.REV. at 800-06. The plurality reaffirmed the knock-and-announce requirement. *Ker, supra,* at 40. The plurality held that the entry complied with the recognized exceptions to the California knock-and-announce rule and was, therefore, reasonable under the Fourth Amendment. *Id.* at 40-41.

Justice Brennan, writing for the four concurring Justices,

[34] Justice Jackson's opinion was cited and partially quoted by Justice Brennan in *Ker, infra,* at 58 n. 12, and in *Miller, infra,* at 313 n. 12.

however, concluded that the knock-and-announce rule of the common law was so well established that it was thus a part of the Fourth Amendment. *Id.* at 47-59 (BRENNAN, J., concurring). Justice Brennan noted that even "service of the general warrants and writs of assistance was usually preceded at least by some form of notice or demand for admission." *Id.* at 52.

Justice Brennan also noted the "compelling considerations" protected by the knock-and-announce rule: (1) protection against mistaken entries of innocent householders which will shock them and disrupt their privacy, and (2) protection against violence by and against householders. *Id.* at 57-58.

Thus, it can fairly be concluded that eight Justices in *Ker* concluded that the knock-and-announce rule was a part of the Fourth Amendment. Indeed, commentators have concluded that *Ker* constitutionalized the knock-and-announce rule.[35]

F. Current state statutes and cases applying the knock-and-announce requirement help determine Fourth Amendment reasonableness

The common law knock-and-announce rule is and always has been the law in the overwhelming majority of states. Indeed, at least forty-one states adhere to the knock-and-announce rule by statute (Appendix A, *infra,* at A-3—A-6) or caselaw (Appendix B, *infra,* at A-7—A-8). Furthermore, it applies to all federal searches, seizures, and arrests (Appendix C-1, *infra,* at A-9) as well as those in United States territories (Appendix C-2, *infra,* at A-9). Only a few states, such as Arkansas in this case, specifically reject any knock-and-announce requirement. (Appendix D, *infra,* at A-10)

[35] *See, e.g.,* Sonnenreich & Ebner, *No-Knock and Nonsense: An Alleged Constitutional Problem,* 44 ST.JOHN'S L.REV. 626, 643 (1970); Blakely, *The Rule of Announcement and Unlawful Entry:* Miller v. United States *and* Ker v. California, 112 U.PA.L.REV. 499, 551 (1964); Note, *supra,* 93 COLUM.L.REV. at 693-94.

This "clear consensus among the States adhering to th[is] well-settled common-law rule" is entitled to great deference in this Court in determining what the Fourth Amendment requires for a "reasonable" search. *Payton,* 445 U.S. at 590.[36] As previously stated, *Payton* and *Boyd,* 116 U.S. at 623, also leaned heavily on the actions of Congress in determining what Fourth Amendment reasonableness requires.

Congress has spoken most eloquently on the knock-and-announce requirement by its actions in: (a) first requiring federal officers follow state search and seizure law that it knew required notice and announcement in the Judiciary Act of 1789 (*see* Part III.B.2., *supra*); (b) then adopting the announcement requirement of 18 U.S.C. § 3109 in 1917 (*see* Part III.D.2.b., *supra*); (3) by affirming its intention on the scope of the application of the statute far beyond espionage cases by not limiting *Giles;* and (4) then repealing the ill-fated federal drug "no-knock" search and seizure law after four years of abuse and deadly mistakes (*see* Part III.D.4., *supra*).

That is a clear expression of what is "reasonable" under the Fourth Amendment.

IV. The common law as a basis for construing the Fourth Amendment.

The common law has long provided significant, if not decisive, guidance as to what the Framers of the Fourth Amendment thought was a reasonable search, particularly when the sanctity of the home is at issue.

A. Historical view

[36] *Payton, supra,* at 590 & n. 5 (bracketed material added) (quoting and citing *United States v. Watson,* 423 U.S. 411, 423 (1976) construing the common law rule that an officer with probable cause has the power to arrest a suspected felon in a public place).

It has been said that the Fourth Amendment did not create any new rights; it only reaffirmed the common law right to be free from unreasonable searches and seizures.[37] In the Court's first Fourth Amendment case, *Boyd, supra,* at 624-25 it said that past abuses defined Fourth Amendment reasonableness:

> In order to ascertain the nature of the proceedings intended by the fourth amendment to the constitution under the terms "unreasonable searches and seizures," it is only necessary to recall the contemporary or then recent histories of the controversies on the subject, both in this country and in England.

The Court recounted the history of the infamous writs of assistance, James Otis' famous courtroom argument against the tyranny of unreasonable searches and seizures under the writs in Massachusetts, and stated that *Entick v. Carrington,* 19 How.St.Tr. 1029 (K.B.1765), also expressed the intent of the Framers. *Boyd,* 116 U.S. at 626-27. In addition, the Court found legislation adopted contemporaneously with the referral to the states of the Fourth Amendment touching on searches and seizures in collection of import duties as having relevance to what the Framers considered "unreasonable." *Id.* at 623.

As previously stated, the Court followed *Boyd* on this

[37] 3 J. Story, Commentaries on the Constitution of the United States ch. 44, ¶ 1903, at 679 (3d ed.1858) ("The Fourth Amendment is little more than the affirmance of a great constitutional doctrine of the common law.") (the first edition is quoted in *County of Riverside v. McLaughlin,* 500 U.S. 44, 70 (1991) (Scalia, J., dissenting)); Lasson, *supra,* at 43; Landynski, *supra,* at 100. "Unreasonable search and seizure is forbidden by the common law, and by the Fourth Amendment to the Constitution of the United States . . . , which is but declaratory of the common law on the subject." *McClannan v. Chaplain,* 136 Va. 1, 14, 116 S.E. 495, 498 (1923).

issue in *Carroll v. United States,* 267 U.S. 132, 149-50 (1925), where the Court stated that the Fourth Amendment right to be free from unreasonable searches and seizures "is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted." *Id.* at 149 (quoted in *Minnesota v. Dickerson,* 113 S.Ct. 2130, 2139 (1993) (SCALIA, J., concurring).[38])

B. Modern view

The Court regularly looks to the common law to determine the "reasonableness" of police activity under the Fourth Amendment. *See, e.g., Tennessee v. Garner,* 471 U.S. 1, 13 (1985); *United States v. Watson, supra,* at 418-19; *Gerstein v. Pugh,* 420 U.S. 103, 111, 114 (1975); *Carroll v. United States, supra,* at 149-57. The common law is sometimes considered the touchstone of Fourth Amendment "reasonableness." *See, e.g., California v. Hodari D.,* 499 U.S. 621, 624-29 (1991); *County of Riverside v. McLaughlin,* 500 U.S. 44, 66 (1991) (SCALIA, J., dissenting); *California v. Acevedo,* 500 U.S. 565, 583 (1991) (SCALIA, J., concurring in the judgment). Most simply put, the question is: Would the Framers of the Fourth Amendment sanction the search at issue? *Steagald v. United States, supra,* at 220.

In *Payton v. New York, supra,* at 591-97, the Court examined the common law at great length in determining whether the police needed a warrant to enter a home to make

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[38] *Dickerson, supra,* (SCALIA, J., concurring):

> The purpose of the provision, in other words, is to preserve that degree of respect for the privacy of persons and the inviolatibility of their property that existed when the [Fourth Amendment] was adopted—even if a later, less virtuous age should become accustomed to considering all sorts of intrusion "reasonable."

(bracketed material added)

a routine felony arrest. The Court concluded: "An examination of the common-law understanding of an officer's authority to arrest sheds light on the obviously relevant, if not entirely dispositive, consideration of what the Framers of the [Fourth] Amendment might have thought to be reasonable." *Id.* at 591 (bracketed material added).

Earlier, the Court considered numerous common law authorities in finding that the common law and Fourth Amendment permitted an officer to follow a fleeing arrestee into a house and make an arrest. *Watson, supra,* at 418-22.

Other examples of the Court following the common law to determine Fourth Amendment reasonableness are as follows:

1. Common law standards and procedures for arrest and detention. *Gerstein, supra; Watson, supra; Steagald v. United States, supra,* at 217 n. 10.[39]

2. The definition of seizure of the person. *Hodari D., supra,* at 626 n.2.

3. The common law search incident doctrine. *United States v. Robinson,* 414 U.S. 218, 230-33 (1973).

4. Probable cause permits arrest for a felony. *Coolidge v. New Hampshire,* 403 U.S. 443, 511 n. 1 (1971) (WHITE, J., concurring and dissenting); *Trupiano v. United States,* 334 U.S. 699, 705 (1948); *Carroll, supra,* at 156-57.

5. The definition and scope of the curtilage. *California v. Ciraolo,* 476 U.S. 207, 212 (1986); *United States v. Dunn,* 480 U.S. 294, 300 (1987). However, the common law of trespass is not controlling in determining the scope of the reasonable expectation of privacy under the open fields doctrine. *Hester v. United States,* 265 U.S. 57, 59 (1924); *Oliver v. United States,* 466 U.S. 170, 180 (1984).

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[39] *See also County of Riverside v. McLaughlin, supra,* at 62 (SCALIA, J., dissenting); *Albright v. Oliver,* 114 S.Ct. 807, 815 (1994) (GINSBURG, J., concurring) (bail is continued detention).

C. Consideration of changing times

The social expectation of the times has always been considered relevant to the consideration of the application of the common law and the Fourth Amendment.[40] And, what was permissible at common law may not be under current mores.

The *Payton* Court noted that the development of Fourth Amendment doctrine "has not simply been frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage." *Id.* at 591 n. 33, quoted in *Steagald v. United States, supra,* at 217 n. 10, and *Tennessee v. Garner, supra,* at 13. In *Garner,* the Court held that the common law police authority to shoot and kill a fleeing nonviolent felon no longer was valid in light of current social values.[41] *See also Hodari D., supra,* at 637

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[40] Societal understandings also form the basis of the second prong of the expectation of privacy standard of *Katz v. United States,* 389 U.S. 341, 361 (1967) (HARLAN, J., concurring). *See, e.g., Minnesota v. Olson, supra,* at 100 (standing of houseguest); *Skinner v. Railway Labor Executives Asso.,* 489 U.S. 602, 617 (1989) (privacy interest in collection of urine); *O'Connor v. Ortega,* 430 U.S. 709, 716-17 (1987) (privacy interest in a desk at work).

[41] The respondent will likely argue the converse of this question: Can current social values alter the common law rule in a way that diminishes, rather than enlarges, individual liberty? We submit that Justice Scalia indicated in *Dickerson, supra,* at 2139, that they cannot:

> The purpose of the provision, in other words, is to preserve that degree of respect for the privacy of persons and the inviolatibility of their property that existed when the [Fourth Amendment] was adopted—even if a later, less virtuous age should become accustomed to considering all sorts of intrusion "reasonable."

(bracketed material added) *See also County of Riverside, supra,* at 66 (SCALIA, J., dissenting).

(STEVENS & MARSHALL, JJ., dissenting).

V. THE POLICIES OF THE KNOCK-AND-ANNOUNCE RULE STILL APPLY IN 1995

The policies recognized at common law underlying the knock-and-announce rule are: (A) protection of fundamental and overall privacy interests in the home by (1) permitting the target of the search to surrender his or her privacy under the processes of the law, and (2) granting the police and householder an opportunity to avoid searches of the wrong place or arrests or searches of otherwise innocent persons; (B) protection against violence by startled householders or nervous police officers waving guns at everybody in the house during a highly charged situation that invites the use of deadly force; and (C) protection against unnecessary destruction of private property.

For seven centuries, the common law has held the privacy right in the home to be a paramount interest. Society certainly has changed since 1275 and 1603. Nevertheless, the interests recognized in the common law are still valid today. Indeed, they may be more important today.

A. Protection of privacy interests

The privacy interests in the home protected by the Fourth Amendment are, without doubt, substantial. *See* Part I.A., *supra*. Accordingly, courts have not been grudging in their application of the knock-and-announce rule,[42] and this

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This issue is pending in *Stevens v. Wisconsin,* pet. for cert. pending, 93-9026. The Wisconsin Supreme Court held that the common law had to give way to the realities of the drug culture. *State v. Stevens,* 181 Wis.2d 410, 511 N.W.2d 591, 594-96 (1994).

[42] *See generally* Annots., *What constitutes violation of 18 U.S.C.S. § 3109 requiring federal officer to give notice of his authority and purpose prior to breaking open door or window or*

Court is no exception.

For example, *Miller v. United States, supra,* the Court held that while it would not take much for the government to comply with the knock-and-announce requirement, the rule serves important purposes and must be closely followed. *Id.* at 309-10. The mere fact that the defendant attempted to close the door on the officers did not show that he knew who they were or what their purpose was. *Id.* at 311. The Court held that the officers did not comply with 18 U.S.C. § 3109, so the defendant could not be arrested in his home without officers first giving him notice. *Miller,* 357 U.S. at 313-14.

Similarly, in *Sabbath v. United States,* 391 U.S. at 589-90, the Court held that the "breaking" requirement in § 3109 did not require a physical breaking. Thus, merely using a key or turning a doorknob is a "breaking."[43]

These policies underlying the requirement of announcement apply to the innocent and guilty alike. After all, an innocent householder is more likely to defend his or her house believing that the entry is by a criminal. Likewise, even the guilty, such as in *Mincey,* may believe that they are being robbed and defend themselves. Even business owners have reason to fear unannounced entries after hours.[44]

We are, after all, talking about homes. Just what can one expect is going on inside? In *Hall v. Shipley,* 932 F.2d

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other part of houses to execute search warrant, 21 A.L.R.Fed. 820 (1974); *What constitutes compliance with knock-and-announce rule in search of premises—state cases,* 70 A.L.R.3d 217 (1976).

[43] *Id.* at 590 ("The protection afforded by, and the values inherent in, § 3109 must be 'governed by something more than the fortuitous circumstance of an unlocked door.'").

[44] Some horrible, violent crimes have occurred during criminal entries into businesses through the back door after closing time. *See, e.g., Holloway v. Arkansas,* 435 U.S. 475 (1978) (rape of waitresses during robbery of closed business).

1147 (6th Cir.1991), officers executing a search warrant for a small quantity of marijuana used a battering ram to break down Hall's apartment door because they heard sounds from inside that indicated to them the drugs were being destroyed. What they heard was Hall making love with his girlfriend. He was detained in the nude and not permitted to dress. The search produced a small quantity of marijuana, but he was not prosecuted; the prosecuting attorney declined because of the small amount involved.

The values the knock-and-announce rule is designed to protect are served by giving the suspect the opportunity to surrender his or her privacy to the warrant, the processes of the law. When the suspect does that, the other interests are automatically served as well.

B. Protection against violence

While the policy of protection of privacy interests is more idealistic, the policy of protection against violence is more basic, realistic, and now appreciated by virtually everyone with a television.

With nightly reruns of "COPS" on the Fox Television Network and all its affiliates, we all get to see police officers armed with search warrants, laser-sighted assault weapons and semiautomatic handguns, battering rams, and stun grenades invade the homes of fellow citizens suspected of crime. The officers talk freely for the camera about protecting themselves during raid. It is heady stuff to see the SWAT Team at the ready, their adrenaline pumping, readying to kick down the door of a suspected drug dealer's home. The officers are trained to expect the worst, and they are carrying cocked weapons pointed at people they fear may be violent. They are trained to shoot first and ask questions later.[45]

There is a grave potential for violence in any unannounc-

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[45] It is a common refrain by law enforcement officers that they "would rather be judged by twelve than carried by six."

ed entry into occupied premises, whether by the police or anyone else.[46] The early common law cases recognized it. (*See Curtis's case, supra,* Part II, where the unannouncing officer was killed with an ax.) As early as 1948, Justice Jackson, concurring in *McDonald v. United States,* 335 U.S. 451, 460-61 (1948), noted the great risk of violence in unannounced police entries:

> I am the less reluctant to reach this conclusion because the method of enforcing the law exemplified by this search is one that is certain to involve the police in grave troubles if continued. That it did not do so on this occasion was due to luck more than to foresight. Many homeowners in this crime-beset city doubtless are armed. When a woman sees a strange man, in plain clothes, prying up her bedroom window and climbing in, her natural impulse would be to shoot. A plea of justifiable homicide might result awkwardly for enforcement officers. But an officer seeing a gun being drawn on him might shoot first. Under circumstances of this case, I should not want the task of convincing a jury that it was not murder. I have no reluctance in condemning as unconstitutional a method of law enforcement so reckless and so fraught with danger and discredit to law enforcement agencies themselves.

It is universally understood in America that householders can defend their home.[47] The ability to shoot first and ask questions later applies with greater force to one whose habitation is being invaded. For example, Ark. Code Ann. § 5-

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[46] In addition, the first judicial finding of justifiable homicide may have occurred in 1256 when a servant of a householder killed "a lunatic chaplain [who] had broken into a house by night." 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW ch. VIII, § 2, at 478-79 (2d ed.1899) (bracketed material added).

[47] MODEL PENAL CODE §§ 3.04(2)(b), 3.06(3)(d), 3.07(5) (Official Draft 1962; 1985 ed.) & *Commentary* at 91 (follows common law); RESTATEMENT (SECOND) TORTS § 79, Comment *b*, illusrations 1-2.

2-620 (Repl.1993) provides:

> (a) The right of an individual to defend himself and the lives of persons or property in his home against harm, injury, or loss by persons unlawfully entering or attempting to enter or intrude thereupon is reaffirmed as a fundamental right to be preserved and promoted as a public policy in this state.
>
> (b) There shall be a legal presumption that any force or means used to accomplish such purpose was exercised in a lawful and necessary manner, unless that presumption is overcome by clear and convincing evidence.
>
> (c) The above-stated public policy shall be strictly complied with by the courts, and appropriate instructions thereof shall be given to juries sitting in trial of criminal charges brought in connection therewith.[48]

Underscoring this argument now are three revealing statistics: 42% of America's 96.4 million households have some kind of firearms[49] and we have 225 million handguns.[50] When

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[48] Indeed, what about armed criminals pretending to be police? This is the new pattern of armed robbery in Little Rock. Barnes, "Kicking in doors new trend among thieves," *Arkansas Democrat-Gazette,* Jan. 21, 1995, 1A, 12A. Police recommend shooting:

> [LRPD Det.] Quattlebaum said many of the robbers in the past three months have told their victims they are police officers. Anyone who suspects a person at the door is not who he says he is should phone 911 and ask for a uniformed officer.
>
> But when an attacker just kicks down the door, there is little the occupant can do.
>
> "If you are at home, you carry a big shotgun," Quattlebaum said. "And if they burst through the door, you blow them back."

Id. at 12A (col. 4-5) (bracketed material added).

[49] STATISTICAL ABSTRACT OF THE UNITED STATES (1992), Tables 409 (pistols, 24%; shotguns, 27%; rifles, 23%; any kind of firearm, 42%) & 702, respectively.

Semayne's Case was decided, pistols and rifles had only recently been invented, but they were single shot, crude, inaccurate, and limited to the military. It does not follow, however, that the fact there is a large number of firearms in this country creates a compelling need to eliminate or modify the common law rule because of "changing times." If so, the government could argue that the sheer number of guns in America creates a "strong suspicion" (a 42% likelihood) to believe that *any* suspect has a gun. If anything, these facts should reinforce the need for the knock-and-announce rule to prevent unnecessary harm to all concerned.

Any society that values life sufficient to change the common law rule to preserve life (as *Tennessee v. Garner* shows we do) should expect no more. Being the target of an erroneous search and having a cocked gun stuck in one's face by a police officer ready and willing to shoot should not be a risk, duty, or an incidence of citizenship.

C. Protection of property

When police officers have to kick in or batter down doors, they damage property.[51] But there is more to it than just a broken door jamb or window: after the officers leave, whether the householder was arrested or not, until it is repaired, the house and its occupants and contents are now easy prey to any petty criminal that wants in. But, the householder is in jail (or, worst, the hospital or morgue). Having suffered the indignity of execution of a search warrant, whether justified or not, no citizen needs to be made a burglary victim because the police do not want to be responsible to secure the premises.

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[50] This statistic is taken from the "handgun clock" overlooking Times Square in New York City as of the end of 1994.

[51] Sometimes they do so even when the householder consents to entry. *Rivera v. United States*, 728 F.Supp. 250, 253-55 (S.D. N.Y.1990).

VI. Exceptions to the knock-and-announce rule at common law, in 1995, and in this case

A. The common law exceptions

The three common law exceptions to the knock-and-announce requirement are: (1) useless gesture (the person whose property is to be searched is not there or he or she knows the officer to be one); (2) possible destruction of evidence (based on information within the officer's knowledge that the sought after evidence will likely be destroyed before entry can be obtained; the rationale for no-knock warrants; *see, e.g., Ker, supra,* at 40-41,; and (3) apprehension of peril (based on information within the officer's knowledge that the person who is the target of the search could likely use deadly force to repel the searchers). Every authority and all states and the federal courts recognize these exceptions. *See generally* 2 W. LaFave, Search and Seizure § 4.8(d-f) (2d ed.1987); 2 J. Hall, Search and Seizure §§ 44:11-44:13 (2d ed.1993); Annots., note 42, *supra.*

If petitioner prevails, these common law-based exceptions will still apply under the Fourth Amendment for the same reasons that the knock-and-announce rule does: they define Fourth Amendment reasonableness. The first exception is based on lack of any possible prejudice to the householder because no one was there who was at risk by lack of announcement. The other two are based on exigent circumstances.

B. Exceptions in 1995

The "useless gesture" exception is simple and unremarkable, and it has not changed over time. The questions are simple: Did the target of the search recognize before the entry that the officer was one such that announcement was superfluous? Was there anyone home or capable of hearing to answer the knock at the door?

The two exigency-based exceptions in the "war on drugs" are examples of exceptions swallowing the rule.

The "destruction of evidence" exception is the easiest to abuse. Practically any amount of drugs could be claimed to be flushable. In fact, prosecutors have argued that the mere existence of indoor plumbing creates exigent circumstances.[52]

The "risk of peril" exception is also easy to abuse, but the courts require proof of an articulable risk of violence to justify dispensing with the knock-and-announce requirement. We could literally see prosecutors arguing that since half of the households have firearms, there is always probable cause to invoke this exception. Case law, however, does not support such a rule because there needs to be an articulable fear that the firearms would be used. *See* Annots., note 42, *supra*.

These two exceptions can easily be invoked together by police bootstrapping them. *See, e.g., United States v. Bonner,* 277 U.S.App.D.C. 271, 874 F.2d 822, 826-27 (1989).

C. Exceptions here?

Here, there are no possible claims of any exception to the knock-and-announce requirement.

First, the state asserted no possible exceptions at the suppression hearing, and none were testified to or even alluded to anywhere in the testimony or the affidavit for the warrant or any other papers in the case.

[52] *See, e.g., State v. Bell,* 564 So.2d 1235 (Fla.App.1990); *State v. Bamber,* 592 So.2d 1129 (Fla.App.1991); *State v. Meyer,* 311 N.W.2d 520, 523-24 (Neb.1981) (courts can take judicial notice that existence of plumbing makes it easier to flush drugs); Note, 93 COLUM.L.REV. at 699-701. This is the issue before the Court in *Stevens v. Wisconsin,* petition for cert. pending, No. 93-9026, because the Wisconsin court held that there was a "drug case exception" to the notice requirement. *State v. Stevens, supra.*

All American building codes require that plumbing systems have access for cleaning, and the police can easily place a trap in the line under or next to the house. They can also turn off the water, and the occupants get (at best, depending on the fixture) only one flush.

Second, the affidavit for the search warrant (J.A. 46-48), the search warrant itself (J.A. 47-48), and the facts of the execution of the warrant (Testimony of Dets. Efird and Walls) show that there were none. The key is the nighttime search provision in the search warrant: if destruction of evidence were a risk, why would the judge grant three days in which to search? Also, the judge could not make any finding that there was a risk of destruction of evidence on the record before him, so a nighttime search could not be authorized. *See* note 7, *supra*. Thus, the search warrant itself states that there was no exigency:

> (Choose One)
> (✓) This warrant shall be executed between the hours of 6:00 a.m. and 8:00 p.m.
> or
> ( ) I find reasonable cause to believe that:
> ( ) the place to be searched is difficult of speedy access.
> ( ) the objects to be seized are in danger of imminent removal.
> ( ) the warrant can only be safely or successfully executed at nighttime or under circumstances the occurrence of which is difficult to predict with accuracy and authorized the execution of this warrant at any time, day or night . . . .

J.A. 47-48. When the warrant was executed, it was quite obvious that the officers did not fear any violence against them; they did not approach stealthily (but neither were they obvious), they entered without guns drawn and there was no confrontation. While a small handgun was a subject of the search, and it was found on a table in the living room, there was no move by anyone in the room for the gun. Therefore, based on the record already made and uncontradicted facts,

there were no exigent circumstances.

It probably is not, however, be necessary to reach this issue even if the Court holds in petitioner's favor and finds that the common law knock-and-announce requirement is a part of Fourth Amendment reasonableness.

CONCLUSION

The Framers of the Fourth Amendment expected the knock-and-announce requirement to apply to searches and entries of homes. Therefore, the knock-and-announce requirement is constitutionally required by the Fourth Amendment.

The judgment of the Arkansas Supreme Court should be reversed and the cause remanded.

Respectfully submitted,

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January 1995 *Attorney for Petitioner*

APPENDICES

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APPENDIX A
State statutes requiring notice

Statutes in at least 33 states require notice before entry for arrest or execution of search warrant (where breaking or force is separately mentioned, it is noted):

Alabama: Ala.Code § 15-5-9 (Repl.1982) (search warrant; origin from 1852)

Alaska: Alaska Stat. §§ 12.25.040 & -.1001 (1990) (breaking permitted)

Arizona: Ariz.Rev.Stat. §§ 13-3916(B) (search warrant) & 13-3891 (arrest) (1989); *State v. Wright,* 131 Ariz. 578, 643 P.2d 23, 25 (App.1982) (knock-and-announce constitutionally compelled)

Arkansas: Ark. Code Ann. § 16-81-107 (1987) (arrest)[1]

California: Cal.Penal Code §§ 844 (arrest) & 1531 (West 1989) (search warrant; breaking) (both have origins from 1872); *People v. Jacobs,* 43 Cal.3d 472, 233 Cal.Rptr. 323, 729 P.2d 757, 764 (1987) (knock-and-announce constitutionally compelled); *People v. Gonzalez,* 211 Cal.App.3d 1043, 259 Cal.Rptr. 846, 848 (1989) (same)

Florida: Fla.Stat.Ann. §§ 901.19(1) (arrest) & 933.09 (1985) (breaking permitted) (origins from 1923 and 1939, respectively); *Benefield v. State,* 160 So.2d 706, 710 (Fla.1964) (knock-and-announce constitutionally compelled); *see Napoli v. State,* 596 So.2d 782, 783-84 (Fla.App.1992)

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[1] Note the anomoly here. Arkansas statutorily requires notice of an entry solely to effect an arrest, but this case holds that no notice is required for an entry to arrest *and search* under Ark.R.Crim.P. 13.3(e) (*see* Appendix D).

Georgia: Ga.Code Ann. § 17-5-27 (1990) (reasonable force permitted; origin fron 1863)

Hawaii: Haw.Rev.Stat. §§ 803-11 (arrest) & 803-37 (1988) (breaking permitted)

Idaho: Idaho Code §§ 19-611 (arrest) & 19-4409 (1969) (breaking permitted) (both have origins from 1864)

Indiana: Ind.Stat.Ann. § 35-33-5-7 (1981) (breaking permitted); *State v. Dusch,* 289 N.E.2d 515, 517 (Ind.1972) (knock-and-announce constitutionally compelled)

Iowa: Iowa Code Ann. §§ 755.9 (arrest) & 808.6 (breaking permitted; origin from 1851) (1954); *State v. Brown,* 253 N.W.2d 601, 602 (Iowa 1977) (knock-and-announce constitutionally compelled); *State v. Cohrs,* 484 N.W.2d 223, 225 (Iowa 1992) (same)

Kentucky: Ky.Rev.Stat. § 70.078 (Repl.1980) (breaking permitted; derives from *Phillips v. Ronald,* 6 Ky. 244, 96 Am.Dec. 216 (1867))

Louisiana: La.Stat.Ann., C.Cr.P. Arts. 164 & 224 (West 1991) (search warrant and arrest; breaking permitted; origins to 1928)

Michigan: Mich. Comp. Laws Ann. §§ 764.21 (arrest) & 780.656 (West 1979) (search warrant) (breaking permitted); *People v. Polidor,* 190 Mich.App. 673, 476 N.W.2d 482, 484 (1991), *app. denied,* 439 Mich. 918, 479 N.W.2d 636, *cert. denied,* 113 S.Ct. 298 (1992) (knock-and-announce constitutionally compelled)

Minnesota: Minn.Stat. § 629.34 (1989) (arrest)

Mississippi: Miss.Code Ann. §§ 41-29-157(c) (1993) (drug cases; breaking and no knock permitted) & 99-3-11 (1994) (breaking permitted; 1857 origin)

Missouri: V.A.M.S. § 544.200 (1987) (breaking permitted; 1855 origin)

Nebraska: Rev.Stat.Neb. § 29-411 (1989) (breaking permitted; no knock permitted); *State v. Pierson,* 238 Neb. 872, 472 N.W.2d 898, 901 (1991) (apparently holds knock-and-announce constitutionally required)

Nevada: Nev.Rev.Stat. §§ 171.138 (arrest) & 179.055(1) (search warrant; breaking permitted) (Repl.1992)

New Jersey: *See* Appendix D.[2]

New York: N.Y. Crim.Pro.L. §§ 690.50 (search warrant; breaking permitted) & 690.35(3)(b) (no knock permitted) (McKinney 1993)

North Carolina: G.S.N.C. §§ 15A-251 (search warrant; breaking permitted) & 15A-401 (arrest) (1992)

North Dakota: N.D.C.C. §§ 29-29-08 (search warrant; no knock permitted) & 29-06-14 (arrest; breaking permitted) (1991) (origins of both to 1877); *State v. Sakellson,* 379 N.W.2d 779, 783 (N.D.1985) (knock-and-announce constitutionally compelled)

Ohio: Ohio Rev.Code §§ 2935 12 (breaking permitted) & 2933.231(B) (no knock search warrants permitted) (1993)

Oklahoma: 22 Okla.Stat.Ann. §§ 197 (arrest) & 1228 (search warrant; breaking permitted) (1989)

Oregon: Or.Rev.Stat.Ann. § 133.575(2) (1983) (breaking permitted); *State v. Valentine,* 264 Or. 54, 504 P.2d 84, 85 (1972) (knock-and-announce constitutionally compelled); *State v. Gassner,* 6 Or.App. 452, 485 P.2d 822, 824 (1971) (same); *State v. Bost,* 114 Or.App. 519, 837 P.2d 536, 539 (1992), *rev'd on other grounds,* 317 Ore. 538, 857 P.2d 132, 136

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[2] New Jersey generally does not require notice in execution of arrest and search warrants, but it does in searches involving intoxicating liquor.

(1993) (exigency shown)

Pennsylvania: Pa.R.Crim.Pro. 2007 (1994) (breaking permitted); *Commonwealth v. Newman,* 429 Pa. 441, 240 A.2d 795, 599 (1968) (knock-and-announce constitutionally compelled); *Commonwealth v. Chambers,* 385 Pa.Super. 605, 561 A.2d 1257 (1989) (same); *Commonwealth v. Bull,* 426 Pa. Super. 67, 618 A.2d 1019 (1993) (same)

South Dakota: S.D.C.C. §§ 23A-35-8 (search warrant; breaking permitted; origins to 1877) & 23A-35-9 (no knock permitted) (1989)

Tennessee: Tenn.Code Ann. § 40-7-107 (1986) (arrest; breaking permitted; origins to 1858); *Keith v. State,* 542 S.W.2d 839, 841 (Tenn.Cr.App.1976) (knock-and-announce constitutionally compelled)

Texas: Vernon's Tex. Stat. Ann., C.Cr.P. Art. 15.25 (arrest) & 18.06(b) (search warrant; breaking permitted) (1977)

Utah: Utah Code Ann. §§ 77-7-8 (arrest) & 77-23-10 (search warrant; breaking permitted; no knock permitted) (1990)

Washington: R.C.W.A. § 10.31.040 (1992) (arrest; breaking permitted; dates from 1881); *State v. Coyle,* 95 Wash.2d 1, 621 P.2d 1256, 1261-62 (1980) (knock-and-announce constitutionally compelled); *State v. Garcia-Hernandez,* 67 Wash.App. 492, 837 P.2d 624, 627 (1992) (same)

West Virginia: W.Va.C. § 62-1A-5 (Repl.1992) (search warrant; breaking permitted)

Wyoming: Wyo.Stat.Ann. §§ 7-7-104 (search warrant; breaking permitted) & 7-8-104 (arrest; origins to 1876) (1977)

APPENDIX B

State statutes silent on notice but notice required by caselaw

Nine states with statutes silent on the requirement of notice require notice under the common law or the U.S. or their state constitutions by case law:

Connecticut: *State v. Mariano,* 152 Conn. 85, 203 A.2d 305, 310, *cert. denied,* 380 U.S. 943 (1964); *State v. Anonymous,* 30 Conn.Sup. 197, 308 A.2d 251 (1973)

Delaware: *Marvel v. State,* 290 A.2d 641 (Del.1972); *Gregory v. State,* 616 A.2d 1198, 1200 (Del.1992)

Massachusetts: *See, e.g., Commonwealth v. Cundriff,* 382 Mass. 137, 415 N.E.2d 172 (1980), *cert. denied,* 451 U.S. 973 (1981); *Commonwealth v. Sepulveda,* 406 Mass. 180, 546 N.E.2d 879, 880 (1989) (common law rule followed but not constitutionally required)

New Hampshire: *State v. Jones,* 124 N.H. 515, 503 A.2d 802, 804-06 (1985); *State v. Thompson,* 132 N.H. 730, 571 A.2d 266, 268-69 (1990)

New Mexico: *State v. Baca,* 87 N.M. 12, 528 P.2d 656 (App.1974); *State v. Sanchez,* 88 N.M. 402, 540 P.2d 1291, 1292 (1975); *Guitierrez v. State,* 112 N.M. 774, 819 P.2d 1332 (App.1991) (no knock cannot constitutionally be predetermined in search warrant by magistrate); *State v. Williams,* 114 N.M. 485, 840 P.2d 1251, 1253-55 (App.1992)

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Wisconsin: *State v. Cleveland,* 114 Wis.2d 213, 338 N.W.2d 500 (App.), *aff'd,* 118 Wis.2d 615, 368 N.W.2d 512 (1983); *State v. Stevens,* 181 Wis.2d 410, 511 N.W.2d 591, 594-95 (1994) (but drug cases

involve exigency per se), *pet. for cert. pending*, 93-9026

Vermont: *Chipman v. Bates*, 15 Vt. 51, 59 (1843) (constitutional question reserved in *State v. Ogden*, 640 A.2d 6, 9 (Vt.1993) (Appendix E))

Virginia: *Johnson v. Commonwealth*, 213 Va. 102, 189 S.E.2d 678 (1972), *cert. denied*, 409 U.S. 1116 (1973); *Grover v. Commonwealth*, 11 Va.App. 143, 145, 396 S.E.2d 863, 864 (1990); *Wynne v. Commonwealth*, __ Va.App. __, 427 S.E.2d 228, 230 (1993).

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Federal statutes requiring notice

U.S. Government: 18 U.S.C. § 3109

District of Columbia: D.C. Code §§ 23-524(b) (breaking permitted) & 33-565 (search warrant for drugs) (1981)

APPENDIX C-2

Statutes of U.S. Territories requiring notice[3]

Puerto Rico: 34 L.P.R.A. § 1819 (1990) (breaking permitted; 1902 origin)

Virgin Islands: 5 V.I.C. §§ 3566(b-c) (arrest) & 3904 (breaking permitted; origin to 1921) (1967)

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[3] The statutes of other territories such as Guam and the Northern Mariana Islands were unavailable in counsel's local law school library.

APPENDIX D
States with no notice requirement

States with no general statutory or caselaw requirement of notice before entry in search cases:

Arkansas: Ark.R.Crim.P. 13.3(e) (1994) (breaking permitted for execution of search warrant; notice not mentioned) (*but see* Ark. Code Ann. § 16-81-107 (1987) (arrest warrant) in Appendix A)

Colorado: Colo.Rev.Stat. § 16-3-304(3)(b) (Repl.1986) (such force as is necessary)

Illinois: 725 I.L.C.S. § 5/108-8 (1993) (force permitted; no knock provision); *People v. Ouellette,* 57 Ill.App. 3d 249, 15 Ill.Dec. 20, 373 N.E.2d 114 (1978), *aff'd,* 78 Ill.2d 511, 36 Ill.Dec. 666, 401 N.E.2d 507 (1979) (lack of announcement is a factor in finding unreasonableness); *People v. Condon,* 195 Ill.2d 815, 142 Ill.Dec. 63, 552 N.E.2d 413 (1990), *aff'd,* 148 Ill.2d 96, 170 Ill.Dec. 271, 592 N.E.2d 951 (1992) (same), *cert. denied,* 113 S.Ct. 1359 (1993)

Kansas: Kan.Stat.Ann. §§ 22-2405(3) (arrest) & 22-2508 (1988) (knock-and-announce rule not adopted in Kansas; *State v. Tyler,* 251 Kan. 616, 634, 840 P.2d 413, 427-28 (1992))

Maryland: *State v. Henson,* 236 Md. 578, 204 A.2d 516 (1964) (unclear what Maryland requires).

New Jersey: N.J.S.A. § 33:1-58 (1994) (notice only required in liquor searches); R.Gov.Crim.Pro. 3:3-3 (arrest) & 3:5-5 (searches) are silent; *see State v. Campisi,* 49 N.J. 238, 229 A.2d 631 (1967) (notice was given, so it was not necessary to determine whether notice required)

APPENDIX E
Constitutional question reserved

States reserving the constitutional question:

Utah: *State v. Thurman,* 846 P.2d 1256, 1262 (Utah 1993)

Vermont: *State v. Ogden,* 640 A.2d 6, 9 (Vt.1993)

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No. 94-5707

In The Supreme Court of the United States

OCTOBER TERM, 1994

SHARLENE WILSON — PETITIONER

V.

STATE OF ARKANSAS — RESPONDENT

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARKANSAS

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Does the Fourth Amendment to the United States Constitution require law-enforcement officers to knock and announce their authority and purpose before executing a valid search warrant?

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No. 94-5707

In The Supreme Court of the United States
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SHARLENE WILSON — PETITIONER

V.

STATE OF ARKANSAS — RESPONDENT

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARKANSAS

BRIEF FOR THE RESPONDENT

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Arkansas Rule of Criminal Procedure 13.3 (1994), governing the execution of search warrants, is reprinted in Appendix A.

STATEMENT OF THE CASE

Officer Henry Efird of the Seventh Judicial Drug Task Force began conducting surveillance of petitioner Sharlene Wilson's house in late 1992. (J.A. 33-36) Officer Efird suspected petitioner and Bryson Jacobs, petitioner's soon-to-be husband, were trafficking in drugs. (J.A. 36) As part of this investigation, Officer Efird enlisted a confidential informant to purchase drugs from petitioner and Mr. Jacobs. On November 22, 1992, the confidential informant purchased marijuana from petitioner at the house she shared with Mr. Jacobs. (R. 338-39) On the following day, the confidential informant again went to petitioner's house and purchased methamphetamine from her. (R. 339) On December 30, 1992, the confidential informant again arranged to purchase marijuana from petitioner, this time in a convenience store parking lot. (R. 341-43) As the two sat in petitioner's truck, petitioner brandished a pistol and threatened to shoot the informant if she discovered the informant was working for the police. (R. 342-43, 355) Despite this threat, petitioner sold the informant the marijuana. (R. 355)

The day after petitioner threatened the confidential informant, Officer Efird sought a warrant to search petitioner's house. (J.A. 32-33, 50-52) When applying for the warrant, Officer Efird informed the judge of the threat and the three drug transactions. (J.A. 50-51) Circuit Judge John Cole then found probable cause to issue the warrant which authorized law-enforcement officers to search petitioner's house for illegal narcotics and "a small caliber pearl handled weapon used in the commission of the sale of a controlled substance." (J.A. 46)

Law-enforcement officers went to petitioner's house to execute the search warrant at around 5 p.m. on December 31, 1992. (J.A. 41, 49) Officer Roger Walls, warrant in hand, was the first or second officer to approach petitioner's house. (J.A.

40, 41) A uniformed officer accompanied him. (J.A. 40-41) As the officers approached, Bryson Jacobs called out, "It's the police." (R. 417)[1] When Officer Walls reached the porch, he noticed that the main door was open, with only a screen door separating him from the occupants of the living room, including Bryson Jacobs, whom he could see through the door. (J.A. 41) Officer Walls and the other officer then opened the screen door and, while walking into the house, identified themselves as police officers and told the occupants of the house that they had a search warrant. (J.A. 41) Officer Efird, who helped execute the warrant, stated that the officers did not have their weapons drawn. (J.A. 39)

When the police officers entered the house, they found petitioner in the bathroom with "the commode running[.]" (R. 233) By her own admission, petitioner had flushed marijuana down the commode. (J.A. 39, 68, 70) Mr. Jacobs, petitioner's minor son, and two friends of petitioner were also in the house. (R. 373) During their search of the house, the officers found a loaded Raven .25 caliber semi-automatic pistol in the living room -- the weapon specified in the warrant and which the confidential informant identified as being the one with which petitioner threatened her. (R. 367, 343) The officers also discovered marijuana, methamphetamine, hydromorphone, and various items of drug paraphernalia. (R. 274, 268, 365, 301, 368-70) The police then arrested both petitioner and Bryson Jacobs.

As a result of these various activities, the State charged petitioner with three counts of delivery of a controlled substance,

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[1]Ricky Cate, petitioner's eleven-year-old son testified that he "heard somebody pull up, and . . . said, 'Somebody's here.'" (R. 417) At that point, he stated that Bryson Jacobs said "real loud[,]" "It's the police." (R. 417) The record does not reveal, however, whether the officers executing the warrant knew Bryson Jacobs was aware of their arrival.

two counts of possession of a controlled substance with intent to deliver, one count of terroristic threatening, and one count of possession of drug paraphernalia. (J.A. 5-6, 10-11, 13-14) Before her trial on these charges, petitioner moved to suppress the evidence seized in the search of her house on December 31, 1992. (J.A. 17-18) Among other reasons, petitioner claimed that the evidence should have been suppressed because the police officers failed to knock and announce their identity and purpose before entering her house to execute the warrant. (J.A. 17-18, 30-31) After hearing testimony from various police officers and the petitioner, the court denied the motion. (J.A. 45) Petitioner then proceeded to a jury trial at which she was convicted of delivering methamphetamine on November 22, 1992, delivering marijuana on November 23, 1992, and possessing the drug paraphernalia and marijuana found in her house on December 31, 1992. (J.A. 24-25) The trial court sentenced her to a total of thirty-one years' imprisonment and an $11,000 fine. (J.A. 25-26)[2]

In an opinion issued on July 11, 1994, the Arkansas Supreme Court affirmed all four of petitioner's convictions. (J.A. 72) The Court rejected petitioner's claim that the police officers' failure to knock and announce before entering her house pursuant to a search warrant violated her rights under either the Fourth Amendment or the Arkansas Rules of Criminal Procedure. (J.A. 77) In rejecting the Fourth-Amendment claim, the Court stated that "[t]here is no authority for Ms. Wilson's theory that the knock and announce principle is required by the Fourth Amendment." (J.A. 77) The Court relied upon existing Arkansas case law for its holding that Arkansas Rule of Criminal

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[2]Only petitioner's convictions for possessing marijuana and drug paraphernalia stemmed from the search challenged here. Those convictions resulted in one year's imprisonment and a total fine of $11,000. (J.A. 25, 26)

Procedure 13.3, governing the execution of search warrants, also contained no such requirement. (J.A. 77)

SUMMARY OF THE ARGUMENT

Neither the text of the Fourth Amendment nor the Court's jurisprudence requires police officers to knock and announce before executing a valid search warrant. The Fourth Amendment to the United States Constitution commands that a neutral, disinterested magistrate approve a request and grant the authority for the government to invade an individual's reasonable expectation of privacy from official intrusion. Once the requirements of the Warrant Clause are met, governmental officers carry out the specific commands of the search warrant, and the details of execution are not outlined by the Constitution.

Rather, the Fourth Amendment provides that searches be reasonable. In deciding whether a particular police practice is reasonable, this Court has weighed the privacy interests asserted against the government's interests. The presence of a valid search warrant is highly relevant to the reasonableness inquiry and its constitutionally established criteria inform whether the manner of the search warrant's execution is reasonable.

Police officers called upon to carry out the command of the search warrant have a substantial interest in doing so free from unnecessary risks. The police in this case are compelled by the announced policy of the State that warrants be executed in all practicable safety -- a manner which allows police officers to exercise on-the-scene judgment in obtaining control of the place to be searched, its occupants, and the evidence which is the object of the warrant. This policy protects suspects and innocent bystanders as well as the police in furtherance of another important public interest: the prompt and efficient collection of evidence leading to the fair administration of justice.

Petitioner asserts that a knock-and-announce requirement will better protect her privacy interest, the safety of those at the scene, and her personal property. These assertions are greatly overstated. Her privacy interest lasts but a few seconds. Her purported ability to protect the safety of third parties are illusory; in fact, petitioner's rule may lead to greater risk of injury. Finally, her property interest, compared to what is at stake, is minimal. At bottom, the rule she proposes will not advance the interests she asserts. The balance shows that her *per se* rule is not constitutionally required.

Petitioner disregards the balance of competing interests and advances a wooden application of an alleged common-law practice: if the common law required knock and announce, it is constitutionally compelled. In so doing, petitioner ignores subsequent technological advances that would defeat the very purpose of the rule and slights the reality of its widely recognized exceptions. It is one thing to say that violence was averted by such a rule in an era without professional law-enforcement agencies, but quite another to elevate that rule to a constitutional prescription.

Should the Court nevertheless require police officers to knock and announce before executing a search warrant in some cases, there was plainly no such requirement on these facts. The occupants were aware of the police presence prior to their entry and contemporaneous with their entry the officers announced their authority and purpose. None of the evils petitioner warns of were present: the occupants were aware of the officers before they entered, uniformed officers were present, no guns were drawn, and no property was damaged by the entry.

Even if a rigid rule is required, this case falls within two of the most widely recognized exceptions: the target of the warrant was easily disposable narcotics and a weapon which the petitioner was known to have menacingly brandished presented the possibility of violence.

Should the Court nevertheless conclude that the peaceful entry in this case to execute a valid search warrant transgressed the Reasonableness Clause, the exclusionary rule does not apply generally or specifically. The principles of deterrence are not served by exclusion of evidence in cases where the illegal conduct of the police does not produce an advantage for the state in its prosecution of crime. And even should such an advantage exist, exclusion is inappropriate in this case when the officers executed the search warrant in reasonable reliance on state law.

ARGUMENT

I. THE FOURTH AMENDMENT DOES NOT REQUIRE LAW-ENFORCEMENT OFFICERS TO KNOCK AND ANNOUNCE BEFORE EXECUTING A SEARCH WARRANT.

The Court has never held that the Fourth Amendment to the United States Constitution requires law-enforcement officers to knock and announce their authority and presence before executing a valid search warrant.[3] In *Miller v. United States*, 357 U.S. 301 (1958), and *Sabbath v. United States*, 391 U.S. 585 (1968), the Court held that a federal statute was violated by officers who made unannounced, warrantless entries into dwellings to arrest suspects. Neither case presented a Fourth-Amendment question. In *Ker v. California*, 374 U.S. 23 (1963), a plurality of the Court concluded that the judicially crafted exigent-circumstances exception to California's knock-and-announce statute was not unreasonable under the Fourth Amendment. The Court did not decide in the first instance, how-

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[3]The Fourth Amendment applies to the states through the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643 (1961).

ever, whether knock and announce itself was required by the Fourth Amendment, particularly in circumstances like this case in which officers are armed with a valid warrant.

Neither Fourth-Amendment text and precedent nor history supports the petitioner's view that the Constitution prescribes a rule of knock and announce prior to entry by the State to execute a valid search warrant. At the risk of stating the obvious, had a rigid constitutional mandate like the one petitioner proposes been intended by the drafters, one might expect to find mention of it in the text of the Fourth Amendment. One, of course, does not. Petitioner does not explicitly argue that the requirement is found in the Warrant Clause, where it should logically be, and her efforts to wring such a requirement from the Reasonableness Clause are unavailing.

A. The Warrant Clause Does Not Require Law-Enforcement Officers To Knock And Announce Before Executing A Search Warrant.

Petitioner does not plainly argue that the Warrant Clause of the Fourth Amendment requires police officers to knock and announce their authority and purpose before executing a search warrant. Yet, if officers are required by the Constitution to knock and announce when they execute a search warrant, as petitioner claims, then one would likely find that requirement -- or at least its restrictive opposite, a prohibition on no-knock warrants -- in the Warrant Clause. Such a requirement or restriction, however, is neither contained in the Warrant Clause nor the Court's cases construing it.

The Warrant Clause of the Fourth Amendment to the United States Constitution provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Consistently with this plain language, the Court has held that the Warrant Clause requires only three things: 1) warrants must be issued by neutral, disinterested magistrates; 2) those seeking the warrant must demonstrate probable cause to believe that the evidence sought will aid a particular apprehension or conviction; and 3) warrants must describe with particularity the things to be searched and seized. *Dalia v. United States*, 441 U.S. 238, 255 (1979). Limited to these three requirements, the Warrant Clause does not dictate the manner in which warrants are to be executed. Thus, in *Dalia* itself, the Court stated that "it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant[.]" *Id.*, at 257 (footnote omitted). The Warrant Clause's failure to require knocking and announcing should preclude adoption of the practice as a constitutional rule.

B. The Reasonableness Clause Does Not Require Law-Enforcement Officers To Knock And Announce Before Executing A Search Warrant.

While the general requirements of reasonableness apply to the manner of the execution of a warrant, *e.g.*, *Zurcher v. Stanford Daily*, 436 U.S. 547, 559-60 (1979), the reasonableness of a search generally turns on whether it was conducted pursuant to a valid warrant and what was required by that warrant. *See United States v. United States District Court*, 407 U.S. 297, 309-10, 314-15 (1972); *see also Marshall v. Barlow's, Inc.*, 436 U.S. 307, 328 (1978)(Stevens, J., dissenting). In deciding whether a *particular* police practice is reasonable, however, the Court has repeatedly said that the importance of the public interests must be weighed against the nature of the intrusion upon Fourth-Amendment rights. *E.g.*, *Maryland v. Buie*, 494 U.S. 325, 332 (1990); *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 619 (1989); *United States v.*

Villamonte-Marquez, 462 U.S. 579, 588 (1983); *Delaware v. Prouse*, 440 U.S. 648, 654 (1979); *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977)(per curiam); *United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975); *Terry v. Ohio*, 392 U.S. 1, 20-21 (1968). Indeed, the Court has stated that the balancing of these competing interests is "the key principle of the Fourth Amendment." *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (citation and quotation omitted). A balancing of the interests here clearly dictates against the adoption of a rigid rule requiring police officers to knock and announce their presence before executing a warrant.

1. A Balancing Of The State And Private Interests At Stake Does Not Require Knock And Announce To Precede Execution Of A Search Warrant As A Matter Of Fourth-Amendment Law.

By the time a search warrant is to be executed, the balance has already been struck in the State's favor: the substantial privacy interests of the citizen have been weighed against the Fourth Amendment's Warrant-Clause requirements. The remaining interest of the citizen, whatever it is, does not require law-enforcement officers who are executing the warrant to knock and announce to guarantee that the State's execution of the warrant will be reasonable.

On the public-interest side of the scales, law-enforcement officers have a substantial interest in being able to secure the site so it may be searched promptly, efficiently, and safely. This interest militates against adopting a rule requiring them to knock and announce their purpose and authority before execution because warrants direct police officers to go into places unknown to them and, where, it is safe to say, they are not

welcome.[4] Their success in fulfilling the mandate to search for evidence and instrumentalities of crime depends on their ability to establish command of the scene and secure the safety of themselves, the occupants, if any, of the place to be searched, and bystanders.

Police officers face an unquantifiable risk of violence every time they go into a house to execute a search warrant. Indeed, the Court has recognized the unique danger police officers face in suspects' houses because the officers are coming onto their adversaries' "turf" which has a configuration unknown to the officers. *See Buie*, 494 U.S. at 333; *see also Mimms*, 434 U.S. at 110 (stating that the state's asserted interest in officer safety is "both legitimate and weighty"). As one commentator has noted, this risk is heightened by a knock-and-announce requirement:

> a police officer making a high-risk warrant entry is at a severe disadvantage. When he announces authority and purpose he makes himself readily identifiable. The suspect, concealed inside a house, will generally be able to see the officer, or know where the officer is since he is most often near the door. Even if the officer can see occupants inside the house, he does not know if they intend to resist unless they are naive enough to reveal their violent intentions. The officers are most vulnerable when entering the house. If the announcement has given the [suspect] time to arm himself, all he need do is aim his firearm at the door and wait for a target to appear.

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[4] In this case, for example, petitioner had threatened to shoot the informant if she was working for the police.

Note, D. Allegro, *Police Tactics, Drug Trafficking, and Gang Violence: Why the No-Knock Warrant Is an Idea Whose Time Has Come,* 64 Notre Dame L.Rev. 552, 566 (1989)(footnotes omitted).[5]

In *Michigan v. Summers,* 452 U.S. 692, 702-03 (1981), the Court recognized that the "risk of harm to both police and the occupants [of an area subject to a search] is minimized if the officers routinely exercise unquestioned command of the situation." The sooner the officers have complete control of the situation, the less likely it is that any confrontation between suspects and officers will escalate to the point of gunfire. Minimizing this risk, in turn, ensures the safety not only of the officers, but also of suspects and of innocent bystanders or passers-by.

Officers need to control the scene immediately, not only for their own safety and the safety of others, but also to seize evidence. After all, a search warrant commands officers to go to a particular place to seize evidence. If officers must knock and announce their authority and presence, they provide the occupants of the house with the opportunity not only to arm themselves, but to dispose of the evidence -- particularly in cases involving drugs.[6] An individual has no constitutionally protected interest, however, to destroy the evidence or contraband. *See, e.g., Segura v. United States,* 468 U.S. 796, 816 (1984).

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[5]The risk of violence is even greater where, as in this case, the search involves drugs and weapons. *See United States v. Payne,* 805 F.2d 1062, 1065-66 (D.C. Cir. 1986)(per curiam)(recognizing the high correlation between drug trafficking and the presence of firearms and collecting cases).

[6]In this case, for example, petitioner admitted she was flushing the evidence (drugs) down the toilet presumably after receiving notice of the arrival of the police from Mr. Jacobs.

Taking command of the situation is thus vital to the safe and effective execution of a search warrant. Officers executing a warrant are in the best position to decide how to take command of the situation and whether knocking and announcing will hinder or help their ability to do so in a particular case. In some cases police officers will undoubtedly decide that their safety, the safety of others, and the effective execution of the warrant dictate that they knock and announce; in other cases, they will decide that such a procedure would be counterproductive or even dangerous. The Court has previously decided that it is constitutionally reasonable to allow officers in the field to decide what course of action to pursue instead of requiring them to "take unnecessary risks[.]" *Terry,* 392 U.S. at 23-24; *see also Graham v. Connor,* 490 U.S. 386, 396-97 (1989)(stating that the "calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments . . . in circumstances that are tense, uncertain, and rapidly evolving"). The avoidance of such risks is the overriding concern of the Arkansas Rule of Criminal Procedure governing the execution of warrants, even without a knock-and-announce requirement.[7]

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[7]Arkansas Rule of Criminal Procedure 13.3(a) (1994) provides that search warrants shall be executed with "all practicable safety." Under subsection (b) of the Rule, the officer executing a search warrant must "as soon as is practicable, state his authority and purpose and furnish a copy of the warrant[]" to the person in apparent control of the premises. Under Rule 13.3 officers are required to announce their authority, but they do not have to so before entry in every case. The Rule, which the officers complied with here, strikes the appropriate balance by allowing the officers at the scene, the ones whose lives are at stake, to decide what is practicable in any given situation.

Federal Bureau of Investigation statistics bear out that Arkansas' procedures maximize officer safety. From 1980 to 1993,

Adoption of the rule petitioner advocates would not eliminate officers' discretion in the field -- the allegedly chief evil against which the rule is directed. *See* Brief of *Amicus Curiae* American Civil Liberties Union at 14-15 (ACLU Br.). Even petitioner's own formulation of the rule provides that it can be ignored under exigent circumstances. Petitioner's Brief at 63 (Pet. Br.). Thus, the officers executing the warrant will still have to decide whether a particular exigency exists.[8] Only an officer at the scene can determine, for example, whether knocking and announcing in a particular case will be a "useless gesture." *See* Pet. Br. at 63. Under petitioner's rule, executing officers will still also have the discretion to decide when the occupants' failure to acknowledge their knock and announce becomes a constructive refusal, thus allowing them to enter forcibly in any event. *See, e.g., United States v. Lucht,* 18 F.3d 541, 549 (8th Cir.), *cert. denied,* 115 S. Ct. 363 (1994); *United States v. Bonner,* 874 F.2d 822, 824-26 (D.C. Cir. 1989).

Nor would adoption of petitioner's rule eliminate litigation of the knock-and-announce issue. The lower federal courts' ex-

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no Arkansas police officers were killed investigating drug-related offenses or executing search warrants. Nationally, during this same time period, seventy-five officers were killed investigating narcotics offenses and sixteen were killed executing search warrants. Federal Bureau of Investigation, Uniform Crime Reporting Program, *Law Enforcement Officers Killed and Assaulted* (1980-1993)(data extracted from published annual reports for years 1980 through 1993).

[8]Petitioner does not advocate so-called "no-knock" warrants to eliminate this alleged problem nor could she reasonably do so. In *Dalia,* 441 U.S. at 257, the Court rejected the argument that warrants should dictate the method of entry -- leaving that decision to the officers executing the warrant.

perience with 18 U.S.C. § 3109 (1988) demonstrates that any holding by the Court that knock and announce is constitutionally required will not end the inquiry as to what officers must do when they reach the threshold of a door. Under § 3109, for example, courts regularly adjudicate the number of seconds officers must wait between knocking and announcing and entering when there has been no response to their notice. *See, e.g., United States v. Spriggs,* 996 F.2d 320, 323 (D.C. Cir.), *cert. denied,* 114 S. Ct. 359 (1993); *United States v. Garcia,* 983 F.2d 1160, 1168 (lst Cir. 1993). It is one thing for Congress to put federal courts in the position of deciding whether a federal statute requires police officers to wait more than fifteen seconds after knocking and announcing in a "louder than . . . normal voice . . . but not a yell" for the occupants of an apartment to emerge from the "far bedroom" between 7:30 and 7:45 a.m. on a weekday morning. *Spriggs,* 996 F.2d at 322 (quotations omitted). It is quite another for the Court to conclude that such an exercise is a matter of constitutional law, requiring each state to modify its practice accordingly, and creating new Fourth-Amendment claims in the lower federal courts.

Weighed against the public's substantial interests in law-enforcement officers' ability to secure the scene are petitioner's interests in having notice that a search warrant is about to be executed. Petitioner has identified three such interests: she claims that she has a privacy interest in keeping the police outside her house for a few seconds; that a knock-and-announce requirement will better protect the safety of those at the scene; and that there is less chance of property damage if the police are required to wait for admission into the house. Pet. Br. at 57-63. None of these interests, singly or in combination, is sufficient to elevate petitioner's interests over the public's interest in having police officers safely and effectively execute warrants.

Petitioner's privacy interests are only slightly advanced by

a knock-and-announce rule. Although petitioner correctly notes that people normally have the highest expectation of privacy in their houses, her arguments are largely beside the point. There is no dispute that within a matter of seconds after the police arrive with a warrant, they are entitled to enter petitioner's house, with or without permission, and conduct as long and as thorough search as they deem necessary. The search has been authorized by a neutral magistrate, and will occur *regardless* of whether the police knock and announce their presence. Thus, petitioner's arguments about "the sanctity of the home," Pet. Br. at 32, have little to do with the case at hand, because the disruption of her privacy interests are almost entirely attributable to the concedely valid warrant, not the unannounced entry. *See State v. Stevens,* 181 Wis.2d 410, _, 511 N.W.2d 591, 598 (1994), *petition for cert. filed* (U.S. No. 93-9026)(May 4, 1994); *see also Summers,* 452 U.S. at 703 (stating that when officers execute a search warrant "a neutral magistrate rather than an officer in the field has made the critical determination that the police should be given a special authorization to thrust themselves into the privacy of a home.") (footnote omitted). The only invasion of privacy about which petitioner may complain is the presence of the police in her house during the brief period that they would have been standing outside had they knocked and waited to be admitted.

Petitioner's interest in being able to exclude the police from her house between the time that they knock and the time they would be entitled to enter without consent is very limited. It is of limited duration: some jurisdictions with knock-and-announce rules have concluded that police can wait as little as five to ten seconds after knocking before they enter a house. *See, e.g., United States v. Streeter,* 907 F.2d 781, 788-89 (8th Cir. 1990), *overruled on other grounds, United States v. Wise,* 976 F.2d 393 (8th Cir. 1992)(en banc). Petitioner's privacy interest is also of limited scope, given the admittedly substantial privacy intrusion that will occur while the warrant is being executed. When these limited interests are compared to the substantial interests the police have in securing the scene of the search, the balance plainly tips in the State's favor.[9]

The petitioner's asserted safety interests also do not outweigh the State's interest in deciding on a case-by-case basis how best to enter to execute a search warrant. The bulk of petitioner's argument on this point is that a knock-and-announce rule will protect officers from her "right" to use violence against persons breaking into her home. Pet. Br. at 60-61.[10]

Petitioner's arguments about safety are flawed in two respects: First, they erroneously assume that a bright-line rule will lead to less violence than a rule that gives the police on the scene the discretion to decide in each case what approach will

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[9]As for those cases in which the officers may go to the wrong house, the mistake is either redressable because the officers will have acted beyond the scope of the warrant or do not violate the Fourth Amendment in any event. *See Maryland v. Garrison,* 480 U.S. 79, 84-85 & 89 n.14 (1987).

[10]Petitioner has overstated state law on this point. The Arkansas Supreme Court has held that the presumption afforded by Ark. Code Ann. § 5-2-620(b) (Repl. 1993) "has no real effect," *Hopes v. State,* 294 Ark. 319, 323, 742 S.W.2d 561, 564 (1988), and does not legalize murder, *Doles v. State,* 280 Ark. 299, 300, 657 S.W.2d 538, 539 (1983). Thus, at most, petitioner does not have an obligation to retreat in her own home when she reasonably believes a person is using or is about to use unlawful deadly force against her. *See* Ark. Code Ann. § 5-2-607(b)(1)(Repl. 1993). This hardly gives her the unqualified right under Arkansas law to shoot police officers who are executing a valid search warrant.

result in the safest execution of the warrant.[11] The second flaw is that petitioner fails to recognize the substantial incentive the police have to execute warrants in a way that minimizes the potential for violence. In cases where the executing officers believe that their safety and the safety of others will be best protected by knocking and announcing, not only are they *free* to do so, logic dictates that they *will* do so. It does not take a leap of faith to conclude that police will take appropriate steps, including knocking and announcing when appropriate, to minimize the risk of being shot at; but it does take a leap of faith to believe that a *per se* rule of knock and announce will always be the safest way to execute a warrant.

And finally, petitioner claims she has property interests which are protected by a knock-and-announce rule. The facts of this very case show that the failure to knock and announce does not inherently lead to the destruction of property. The police officers did not destroy petitioner's door even though they also did not knock and announce -- they simply walked in through the unlocked screen door. The contrary of petitioner's argument here is equally plausible -- a knock-and-announce rule will not protect doors from destruction in every case. Householders who are not within at the time of the execution of the warrant will still have their doors opened by force. *E.g., United States v. Gervato,* 474 F.2d 40, 44 (3d Cir.), *cert. denied,* 414 U.S. 864 (1973). And, the case law under knock-and-announce statutes is replete with doors lawfully being forced open *after* the officers have knocked and announced. *E.g., United States v. Knapp,* 1 F.3d 1026, 1030-31 (10th Cir. 1993). Even in cases where the door is damaged because the police did not knock first, that minimal property interest pales in comparison to the

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[11] Petitioner's sweeping assertion that officers are trained "to shoot first and ask questions later," Pet. Br. at 59, is unsupported by any factual or legal authority.

interest that the police and public have in the safe execution of warrants.

Thus, the petitioner's interests leave her on the lighter end of the scale on each point. Her privacy interest is small and ephemeral as opposed to the large invasion the deliberative warrant process approves. Her safety-interest claim defies common sense by suggesting that the public interest in the safe execution of warrants is best served by removing discretion from the officers on the scene. And her property-interest argument simply denies that with or without a knock-and-announce rule the executing officers may break the door, if necessary. The balance properly favors the State, and not surprisingly so, because it has started with a valid warrant and seeks only to execute it safely and effectively.

2. Any Common-Law Practice And State Practice Do Not Change The Constitutional Balance.

Petitioner's entire argument can be boiled down to the following: the common law required knock and announce and thus knock and announce is constitutionally compelled. The State disagrees with the petitioner's analysis of the common law. Even if she is correct, however, the Court is not required to adopt a rigid rule fashioned in, as petitioner claims, the year 1275.

Petitioner bases her argument on *Semayne's Case,* 77 Eng. Rep. 194 (K.B. 1603), and reads it as requiring announcement in all cases, including those involving the execution of a modern-day search warrant. Yet, the service by a sheriff of a civil writ -- the facts of *Semayne's Case* -- bears little resemblance to the execution of a modern-day search warrant for evidence of a crime issued by a neutral magistrate, based upon probable cause, specifying with particularity the area to be

searched.[12] *Semayne's Case* comes closer to resembling a modern-day civil action in which the aid of a sheriff is enlisted to repossess personal property pursuant to a court order. *Semayne's Case* does not support knock and announce outside the civil context.

Even if *Semayne's Case* were universal in its application, the case is unclear about what it requires in any event. An examination of the language of *Semayne's Case* suggests that the practice for which petitioner relies upon it was more prescriptive than descriptive. Just like the Arkansas Rules, the case declares the desirability of announcing the intention of serving the writ: "he *ought* to signify the cause of his coming, and make request to open doors...." *Id.*, at 195 (emphasis added). One intended purpose of this language was to admonish constables serving process to announce their purpose and authority, lest they be mistaken for trespassers. *Id.*, at 196; *see also* M. Sonnenreich & S. Ebner, *No-Knock and Nonsense, An Alleged Constitutional Problem*, 44 St. John's L.Rev. 626, 647 (1970)(stating that the purpose of the rule was to avoid the potential for violence).[13] At any rate, this language is merely "precatory" and says nothing which would indicate that the

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[12]One commentator has stated that search warrants were not even known at early common law and that it was never judicially settled whether the rule of announcement applied to them. R. Blakey, *The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California*, 112 U. Penn. L.Rev. 499, 503 (1964).

[13]At common law, constables apparently bore little outward sign of their authority. *Cf.* I. McKenzie, *Behind the Uniform: Policing in Britain and America* 15-20 (1989) (stating that London police officers, members of the first organized police force, did not wear uniforms until 1791).

service made after the illegal entry was rendered invalid as a result of the entry -- the proposition for which petitioner advances it. *See* M. Sonnenreich & S. Ebner, 44 St. John's L.Rev. at 628-29.[14]

The tenuous foundation for petitioner's rule provided by *Semayne's Case* is hardly bolstered by the poor example of the rule's operation found in *The Case of Richard Curtis*, 168 Eng. Rep. 67 (K.B. 1757). Curtis had originally been at Cowling's workshop where an officer attempted to execute process on Cowling, but with the aid of Curtis, Cowling escaped. The officer then sought an additional escape warrant together with more officers and, upon their return to Cowling's workshop, they made known to those inside their intention to arrest Cowling.[15] Curtis stuck his head out the window and swore "that the first man that entered should be a dead man." *Id.* at 67. He carried out his threat and was charged with "wilful murder." The discussion of the rule of announcement explained to what extent the announcement put Curtis on notice so that he formed the necessary intent to commit the crime. The irony of relying on *Curtis's Case* for a modern-day rule of announcement is that the rule did not work in the case (or worked too well) -- the officer announced his presence and was murdered. Such a result is hardly a resounding endorsement for raising the rule to a constitutional commandment.

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[14]A constable who violated the rule may well have been liable for trespass. That is a far cry, however, from petitioner's claim that the process the constable was seeking to serve should be rendered invalid for the failure to knock and announce. *Cf. Oliver v. United States*, 466 U.S. 170, 183-84 & n.15 (1984) (explaining that the law of trespass provides broader protection than the Fourth Amendment).

[15]It is unclear whether the warrant was for a felony.

To the extent that *Semayne's Case* and *Curtis's Case* may suggest a knock-and-announce rule, they do not squarely settle the application of the rule to criminal cases, particularly felony cases. In fact, later decisions reflect a reluctance to extend the rule to such cases. In *Ratcliffe v. Burton*, 3 Bos. & Pul. 223, 127 Eng. Rep. 123 (C.P. 1802), for example, two of the four opinions explicitly stated that any observations about a knock-and-announce requirement were limited to civil cases "without in any degree extending them to the case of criminal process." *Id.*, 3 Bos. & Pol. at 229, 127 Eng. Rep. at 126 (C.J., Lord Alvanley); *see also id.*, 3 Bos. & Pol. at 230, 127 Eng. Rep. at 127 (J., Rooke)("Without referring at all to the case of criminal process . . .").[16] In *Launock v. Brown*, 2 Barn. & Ald. 592, 593, 106 Eng. Rep. 482, 483 (K.B. 1819), Chief Justice Abbott stated that "[it] is not at present necessary for us to decide how far, in the case of a person charged with felony, it would be necessary to make a previous demand of admittance before you could justify breaking open the outer door of his house[.]" *See also* W. Murfree, *A Treatise on the Law of Sheriffs and Other Ministerial Officers* § 1163, at 631 (lst. ed. 1884)(explaining that while there is some doubt, the "better opinion" is that both the English and American rule require "no demand of admittance" in felony cases).

As this discussion of the common-law rule of knock and announce reveals, the rule was, at most, ambiguous. It would be improper for the Court to rely upon the common law as the source of a rigid and fixed rule when it is not entirely clear that the rule was, in fact, so rigid and fixed as actually applied at the common law. To do so would "create . . . a constitutional certainty from a common-law uncertainty." M. Sonnenreich & S.

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[16]The other two opinions did not address the precise question or resolve the issue. *Id.*, 3 Bos. & Pol. at 229-31, 127 Eng. Rep. at 126-27.

Ebner, 44 St. John's L.Rev. at 646.

Even if the common law were as clear and true as petitioner claims, it would not dictate a rigid constitutional rule today. The Court has cautioned against using mechanical rules as the test for reasonableness. *See Bell v. Wolfish*, 441 U.S. 520, 559 (1979). While the Court has found the common law instructive in determining whether a particular practice is reasonable under the Fourth Amendment, *see, e.g. United States v. Watson*, 423 U.S. 411, 418-19 (1976); *Carroll v. United States*, 267 U.S. 132, 149-53 (1925), it has refused to freeze "into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage." *Payton v. New York*, 445 U.S. 573, 591 n.33 (1980); *see also Garner*, 471 U.S. at 13.

In this particular context, freezing constitutional law into the common-law mold would be particularly inappropriate. As the State has already explained, one purpose of the rule in *Semayne's Case* was to protect officers serving process from being mistaken for trespassers. Such a rule may have been necessary in an era in which the constables charged with serving process were part-time, did not wear uniforms, and were often untrained, reluctant citizens from the local community. *See generally* J. Kent, *The English Village Constable 1580-1642* 57-59, 72-79, 139, 220 (1986); *see also* D. Greenberg, *Crime and Law Enforcement in the Colony of New York 1691-1776* 158, 163-65 (1976). A common-law rule which usually protected unwary citizen process servers -- *Curtis's Case* notwithstanding -- hardly seems constitutionally compelled to protect professional police forces today, and in fact, is ill-advised where, as the State has demonstrated above, the rule will actually do more harm than good.

Technological changes also indicate that the knock-and-announce rule may have outlived its usefulness. *See Garner*, 471 U.S. at 13 (stating that relying on the common-law rule would be a mistake in light of "sweeping change in the

legal and technological context[]"). In *Garner,* 471 U.S. at 15-16, for example, the Court recognized that weapons were rudimentary at the time of the common law and most combat was hand-to-hand. In the era in which the common-law rule was developing, the threat of rapid loading and firing weapons was unknown, making it less likely that advance notice of the search would result in deadly violence. Thus, in that era, knock and announce may have been more reasonable. Adhering to a common-law rule fashioned in an era without such weapons, however, seems particularly inappropriate -- if not folly -- in light of today's weaponry. Technological changes are relevant to determining whether a particular practice *is* reasonable, even when considering the Fourth Amendment in light of what *was* reasonable at the time of its adoption. *See Minnesota v. Dickerson,* 113 S. Ct. 2130, 2140-41 (1993) (Scalia, J., concurring).

Finally, the fact that a large number of states require knock and announce as a matter of state law does not mean the Court must elevate such a rule to a constitutional mandate. While the Court has looked to the prevailing rule in individual jurisdictions to determine what is reasonable for Fourth-Amendment purposes, *e.g., Watson,* 423 U.S. at 421-22, the Court has also said, however, that "[t]he States are not . . . precluded from developing workable rules governing arrests, searches and seizures to meet the practical demands of effective criminal investigation and law enforcement in the States[.]" *Ker,* 374 U.S at 34 (plurality opinion). States are free to regulate their own law-enforcement efforts beyond what the Fourth Amendment requires to protect individual rights. That Arkansas' practice is different from the practice of other states is only the genius of federalism. *See id.,* at 31 (plurality opinion) (stating that application of the Fourth Amendment to the states "sounded no death knell for our federalism"). At any rate, many of the states requiring knock and announce appear to do so because it was

required at common law. *See, e.g, State v. Bamber,* 630 So.2d 1048, 1053 (Fla. 1994); *Commonwealth v. Goggin,* 412 Mass. 200, 202, 587 N.E.2d 785, 787 (1992). And, as petitioner concedes, Pet. Br. at 63-64, and the State argues, *infra* at II.B., exigent circumstances are a nearly universal exception to any rule. It is at least arguable that the states' practices show that these exceptions have swallowed the rule. *See* State App. B. Consequently, on the whole, the practice of a majority of the states does not provide any additional insight into what is constitutionally reasonable and required in this context.

Rather, the inquiry should end where it began: whether the *Fourth Amendment* requires petitioner's suggested rule. Without support in the text or in constitutional decisionmaking under either clause of the Fourth Amendment, and with only ambiguous historical and undifferentiated state-practice support, it cannot be said that petitioner's rule is constitutionally compelled.

II. ASSUMING THAT THE FOURTH AMENDMENT REQUIRES LAW ENFORCEMENT OFFICERS TO KNOCK AND ANNOUNCE BEFORE EXECUTING A SEARCH WARRANT IN SOME CASES, THE POLICE OFFICERS' FAILURE TO DO SO IN THIS CASE WAS REASONABLE.

Even if the Fourth Amendment requires the police to knock and announce in some cases for a search to be considered reasonable, there was no such requirement in this case. Under any plausible interpretation of a requirement, the police acted properly in entering petitioner's house as they did. Moreover, there were exigent circumstances that would have justified the failure to comply with any knock-and-announce requirement.

A. The Failure To Knock And Announce Was Not Unreasonable.

The reasonableness of the behavior of the officers in this case is plain in contrast to the interests a knock-and-announce rule is said to protect: privacy, safety of the officers and occupants, and protection against property damage. The execution of the search warrant took place around 5 p.m. on a Thursday afternoon. (J.A. 41, 49) The first two officers to approach the house, one of whom was uniformed (J.A. 41), were visible to any occupants who were looking, as apparently Bryson Jacobs was when he called out "It's the police." (R. 417) The main door was open, and the officers could see inside through a screen door. (J.A. 41) They saw Mr. Jacobs and others and then simply walked into the house, announcing their identity and purpose as they entered. (J.A. 41) Their guns were not drawn (J.A. 39, Pet. Br. at 65), and they used no force that might have startled the occupants (who had either seen them or heard of their arrival) or that might have damaged any property.

Thus, the occupants' privacy was not unreasonably invaded because they saw the officers coming to the open door, the officers made an announcement of identity and authority to search as they walked into the house, and the occupants could not have denied the officers entry. The threat of physical harm due to surprise and alarm was no greater without a knock and announce by the officers than it would have been with one. In addition, the officers did not have their guns drawn or otherwise approach in a manner that might have caused one of the occupants (who was not already so disposed) to reach for a weapon in a panic. Finally, the failure to knock and announce did not result in damage to petitioner's property as the officers entered. Whatever the Reasonableness Clause requires with respect to executing warrants, it can hardly

be said that the officers' entry here was unreasonable.[17]

B. Exigent Circumstances Excused The Failure To Knock And Announce.

Ironically, even under petitioner's extreme view of the Fourth Amendment, the entry in this case would have been upheld, because she concedes, as she must, that a Fourth-Amendment rule would include exceptions for exigent circumstances. Pet. Br. at 63; *see Sabbath*, 391 U.S. at 591 n. 8; *Ker*, 374 U.S. at 39-41 (plurality opinion); *id.* at 47 (Brennan, J., dissenting in part).[18] These exceptions are widely recognized in jurisdic-

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[17] As the State has argued, *supra* at n.7, because the Arkansas Rules of Criminal Procedure require an announcement of purpose consistent with execution with all practicable safety, Arkansas law embodies the Fourth Amendment's reasonableness requirement even without a knock-and-announce requirement in all searches. As in *Ker*, the Court can conclude "the officers' method of entry, sanctioned by the law of [Arkansas] was not unreasonable under the standards of the Fourth Amendment." *Ker*, 374 U.S. at 40-41 (plurality opinion).

[18] The exceptions conceded by petitioner are similar to the three described by Justice Brennan in *Ker:* 1) useless gesture, 2) destruction of evidence, and 3) apprehension of peril. Pet. Br. at 63. While petitioner has suggested that the State's failure to raise exigent circumstances in the Arkansas courts precludes it from making the case for them in this Court, Pet. Br. at 64-65, it is well settled that the prevailing party may raise any ground to lend support to the judgment below which is supported by the record. *See, e.g, United States v. X-Citement Video, Inc.*, 115 S. Ct. 464, 472 (1994); *Dandridge v. Williams*, 397 U.S. 471, 475 n. 6 (1970).

tions that impose a knock-and-announce rule. *See* State Br. App. B (collecting statute and case authority on exceptions for exigent circumstances). And the State agrees with petitioner's statement that they are recognized by every authority and all state and federal courts. Pet. Br. at 63.

At least two of the most widely recognized exigent circumstances were present in this case: the potential for the destruction of evidence of crime and the potential for harm. The primary reason for the warrant in this case was to search for drugs and a gun. Petitioner was the subject of a narcotics investigation which included the use of a confidential informant to purchase drugs from her. (J.A. 36) During the investigation, the police learned that, in addition to selling drugs to the informant, petitioner -- by threatening the informant with a handgun -- was apparently ready to use deadly force to prevent her apprehension. (R. 342-43, 355) On this information, the police would have been justified in concluding that advanced notice of their entry would have increased the risk of violence and the destruction of evidence -- at least the latter of which was confirmed when the police entered and found petitioner flushing marijuana down the commode. (J.A. 39, 68, 70)[19]

[19]Petitioner suggests that because the officers did not have their guns drawn when they entered that they did not have a fear of any harm. Pet. Br. at 65. The flaw in petitioner's reasoning is that she assumes the police would not have drawn their guns had they been required to knock and announce. However, it is at least equally plausible that the police did not draw their weapons because they quickly entered once they saw the open door in order to secure the scene and avoid the panic of a guns-drawn rush of the house. In any event, the officers' subjective state of mind is irrelevant, as the Fourth Amendment inquiry makes an objective assessment of the officers' actions. *See Scott v. United States*, 436 U.S. 128, 136-38 (1978).

Under these circumstances, the entry likely would not have violated the current knock-and-announce rules of many jurisdictions. *See, e.g., United States v. Maxwell*, 25 F.3d 1389, 1395 (8th Cir.), *cert. denied*, 115 S. Ct. 610 (1994); *United States v. Singer*, 943 F.2d 758, 762 (7th Cir. 1991); *Stevens*, 181 Wis. 2d at _, 511 N.W.2d at 596 (listing state cases applying blanket drug exception); *see also* State Br. App. B. The scope of any exigent circumstances under a Fourth-Amendment rule is, of course, unclear, as no such constitutional rule currently exists. Nevertheless, while the contours of such a rule and its exceptions might have to await further constitutional adjudication, at a minimum, the exigent circumstances of destruction of evidence and threats to safety in this case would excuse compliance with any Fourth-Amendment rule.

III. ASSUMING THAT THE POLICE OFFICERS' FAILURE TO KNOCK AND ANNOUNCE WAS UNREASONABLE UNDER THE FOURTH AMENDMENT, THE EXCLUSIONARY RULE DOES NOT REQUIRE THE SUPPRESSION OF THE EVIDENCE SEIZED IN THIS CASE.

Even if the Court concludes that a constitutional violation has occurred, the Fourth Amendment's exclusionary rule does not require suppression in this case for at least two reasons. First, the evidence seized was not the product of the failure to knock and announce, and, second, the officers acted in good-faith reliance on settled state law that the police are not required to knock and announce before executing a search warrant.

A. The Failure To Knock And Announce Is Not An Illegal But-For Cause For The Discovery Of Evidence Under A Proper Search Warrant Which Mandates Exclusion To Enforce The Fourth Amendment.

Before evidence is excluded from a criminal trial because of allegedly illegal government conduct, the courts must ask "whether the challenged evidence was come at by exploitation of the initial illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Segura*, 468 U.S. at 804-05 (internal quotation marks, brackets, citation, and emphasis omitted). Where the failure to knock and announce is the purportedly illegal conduct and the evidence is seized subject to a valid warrant, the evidence never comes by exploitation of the illegality and is always by a means (a valid warrant) patently distinguishable from the illegality so as to bear no taint that would require exclusion.

The Court has given effect to these principles through the inevitable-discovery doctrine.[20] In *Nix v. Williams*, 467 U.S. 431, 443-44 (1984), the Court reasoned that while the exclusionary rule was designed to ensure that the prosecution did not *benefit* from illegal police conduct, its application should not put the prosecution in a *worse* position than if no misconduct had occurred. Thus, "[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by a lawful means . . . then the deterrence rationale has so little basis that the evi-

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[20]The inevitable-discovery doctrine, and the closely related independent-source doctrine, are discussed at length in the *amicus curiae* brief of the State of California, *et al.* (Cal. Am. Br.)

dence should be received." *Id.* at 444 (footnote omitted).

There is no doubt that the evidence would have inevitably been discovered in this case. The police had a valid warrant that allowed them to search petitioner's house, and the search would have taken place regardless of whether the police knocked and announced their presence. Evidence should only be excluded when "the challenged evidence is *in some sense* the product of illegal governmental activity." *Id.* (quotation marks and citation omitted; emphasis in *Nix*). The only sense in which the evidence in this case is connected to any illegal police conduct -- *i.e.*, the only circumstance in which the failure to knock and announce might have "caused" the discovery -- is if the notice given by the police of their presence had given petitioner time to destroy the evidence. It "defies both logic and common sense [ ]" to conclude the Fourth Amendment affords that protection to petitioner. *Segura*, 468 U.S. at 816; *see Ker*, 374 U.S. at 39 (plurality opinion) (quoting *People v. Maddox*, 46 Cal. 2d 301, 306, 294 P.2d 6, 9, *cert. denied*, 352 U.S. 858 (1956)); *see also* Cal. Am. Br. at 13-15.

Exclusion in cases like this will not serve the deterrent purposes of the exclusionary rule because the decision to act illegally (*i.e.*, not knock and announce) is not motivated by a desire to gather evidence. Instead, the illegal conduct is motivated by a desire to accomplish successfully and safely the ends of the judicial mandate to law-enforcement officers -- to seize certain items described by the warrant. Exclusion would achieve the surprising and unfortunate end of excluding contraband seized by a valid search warrant founded on probable cause *and* the perilous effect of leaving law-enforcement officers uncertain of their authority to take command of the scene to ensure the execution of that warrant. *See Summers*, 452 U.S. at 702-03; *see also* Cal. Am. Br. 18-20. Thus, exclusion of evi-

dence is not required to remedy a violation of a knock-and-announce rule. *See, e.g, Commonwealth v. Lopez*, 31 Mass. App. Ct. 547, 549-50, 581 N.E.2d 485, 486-87, *review denied*, 411 Mass. 1105, 586 N.E.2d 10 (1991) (even if no-knock provision of warrant wrongly included, facts of search showed exclusion would not advance any deterrent effect); *see also* Cal. Am. Br. at 21-23.[21]

If the Fourth Amendment requires a knock-and-announce rule so that the failure to knock and announce can later be judged unreasonable and sanctionable, the remedy should speak to the illegal entry, not the legal seizure pursuant to a valid warrant. *Cf.* Cal. Am. Br. at 21. Surely a better remedy lies in the civil law for remonstrance of the hypothetically unreasonable behavior related to taking command than by exclusion of evidence reasonably seized pursuant to a valid search warrant.

B. Even If Exclusion Would Ordinarily Be The Appropriate Remedy, Exclusion Is Not Required Here Because The Entry Was Made In Good-Faith Reliance On State Law That Knock And Announce Was Not Required.

Exclusion has little deterrent effect on police officers who have reasonably relied on judicial determinations that a search warrant may issue. *United States v. Leon*, 468 U.S. 897 (1984). Likewise, exclusion would have little deterrent effect on officers reasonably acting under a state statute. *Illinois v. Krull*, 480 U.S. 340 (1987). As the Court has recognized, the exclusion-

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[21] As *amicus* points out, the Court's judgments in *Miller* and *Sabbath* are not contrary authority as neither case involved a valid warrant and both interpreted 18 U.S.C. § 3109, not the Fourth Amendment. Cal. Am. Br. at 23-25.

ary rule was designed to deter the police, not judges and legislators. *Leon*, 468 U.S. at 916; *Krull*, 480 U.S. at 351. The officers in this case relied on Arkansas law governing the execution of search warrants. If that law is now constitutionally invalid, "[t]here is nothing to indicate that applying the exclusionary rule to evidence seized pursuant to the [law] prior to the declaration of its invalidity will act as a significant, additional deterrent." *Krull*, 480 U.S. at 352 (footnote omitted).

The officers' failure to knock and announce prior to their entry into petitioner's residence was objectively reasonable because the officers could not have known that the Fourth Amendment required them to knock and announce. *Cf. United States v. Moland*, 996 F.2d 259, 261 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 722 (1994) (applying good-faith exception to Colorado no-knock rule in drug cases). Nothing in the Arkansas Rules of Criminal Procedure or case law would have suggested that a knock and announce would be required prior to the execution of a valid search warrant.[22]

Indeed, in 1982 the Arkansas Court of Appeals held that officers are not required to knock and announce before executing a search warrant. *Dodson v. State*, 4 Ark. App. 1, 5-10, 626 S.W.2d 624, 626-29, *cert. denied*, 457 U.S. 1136 (1982) (stat-

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[22] Petitioner's suggestion that knock and announce is required before entry to make an arrest under Ark. Code Ann. § 16-81-107(c) (1987), *see* Pet. App. A at A-3, ACLU Br. at 17 n. 30, is almost certainly wrong as a matter of state law. The Arkansas Rules of Criminal Procedure have no knock-and-announce requirement for searches or arrests, and under Arkansas law, the Rules prevail over conflicting provisions of the Arkansas Code. *E.g., Hickson v. State*, 316 Ark. 783, 784-85, 875 S.W.2d 492, 493 (1994).

ing that Rule 13.3 contains no knock-and-announce requirement and discussing 18 U.S.C. § 3109 and this Court's case law).[23]

Moreover, as petitioner concedes, nothing in the Court's jurisprudence would have suggested to a reasonable officer that Arkansas' law governing the execution of search warrants was constitutionally infirm. Pet. Br. at 50. Consequently, just as the officers in *Krull* acted in objectively reasonable reliance on the Illinois statute allowing them to search certain automotive dealers' facilities, *see Krull*, 480 U.S. at 356, the officers in this case acted in objectively reasonable reliance on Arkansas law allowing them to execute a search warrant without knocking and announcing prior to entry.[24]

The hoped-for deterrent effect of exclusion in this case would be no more useful than it would have been in *Krull* or *Leon*. *See Krull*, 480 U.S. at 350 (quoting *Leon*). As in those cases, exclusion here would not punish the officers for behavior which they knew to be wrong, but for behavior which they reasonably believed to be right. The exclusionary rule serves no Fourth-Amendment interest by meting out such a punishment in this case.

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[23]In 1977 a federal district court concluded that knock and announce was required under Arkansas law. *United States v. Price*, 441 F. Supp. 814, 816-17 n.8 (E.D. Ark. 1977) (though applying Fourth Amendment, court concluded that under state law same result would obtain). The federal district court's conclusions about state or federal law could not, of course, bind the Arkansas state courts. *See Lockhart v. Fretwell*, 113 S. Ct. 838, 846 (1993) (Thomas, J., concurring).

[24]A similar issue is raised in *Arizona v. Evans* (U.S. No. 93-1660) (orally argued Dec. 7, 1994) (reliance on facially valid police-radio report of arrest warrant).

CONCLUSION

The judgment of the Supreme Court of Arkansas should be affirmed.

Respectfully submitted,

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APPENDICES

APPENDIX A

Arkansas Rule of Criminal Procedure 13.3 (1994), governing the execution of search warrants, provides as follows:

> (a) A search warrant may be executed by any officer. The officer charged with its execution may be accompanied by such other officers or persons as may be reasonably necessary for the successful execution of the warrant with all practicable safety.
>
> (b) In the course of any search or seizure pursuant to the warrant, the executing officer shall give a copy of the warrant to the person to be searched or the person in apparent control of the premises to be searched. The copy shall be furnished before undertaking the search or seizure unless the officer has reasonable cause to believe that such action would endanger the successful execution of the warrant with all practicable safety, in which case he shall, as soon as is practicable, state his authority and purpose and furnish a copy of the warrant. If the premises are unoccupied by anyone in apparent and responsible control, the officer shall leave a copy of the warrant suitably affixed to the premises.
>
> (c) The scope of search shall be only such as is authorized by the warrant and is reasonably necessary to discover the persons or things specified therein. Upon discovery of the persons or things so specified, the officer shall take possession or custody of them and search no further under authority of the warrant. If in the course of such search, the officer discovers things not specified in the warrant which he reasonably believes to be subject to seizure, he may also take possession of the things so discovered.
>
> (d) Upon completion of the search, the officer shall

make and deliver a receipt fairly describing the things seized to the person from whose possession they are taken or the person in apparent control of the premises from which they are taken. If practicable, the list shall be prepared in the presence of the person to whom the receipt is to be delivered. If the premises are unoccupied by anyone in apparent and responsible control, the executing officer shall leave the receipt suitably affixed to the premises.

(e) The executing officer, and other officers accompanying and assisting him, may use such degree of force, short of deadly force, against persons, or to effect an entry or to open containers as is reasonably necessary for the successful execution of the search warrant with all practicable safety. The use of deadly force in the execution of a search warrant, other than in self-defense or defense of others, is justifiable only if the executing officer reasonably believes that there is a substantial risk that the persons or things to be seized will suffer, cause, or be used to cause death or serious bodily harm if their seizure is delayed, and that the force employed creates no unnecessary risk of injury to other persons.

APPENDIX B

Jurisdictions with exceptions to their knock-and-announce rules or with no rule at all.

ALABAMA

McClellan v. State, 452 So.2d 909 (Ala. Crim. App. 1984) (no violation of knock-and-announce statute where the officers pursued the defendant inside house to prevent him from flushing marijuana down the toilet)

ALASKA

Hudson v. State, 792 P.2d 290 (Alaska Ct. App. 1990) (knowledge of defendant's prior possession of weapons created exigency that justified noncompliance with knock-and-announce requirement)

CALIFORNIA

People v. Santiago, 71 Cal.2d 18, 453 P.2d 353, 76 Cal. Rptr. 809 (1969) (en banc) (the police must have a reasonable belief based on specific facts that evidence will be destroyed to justify unannounced entry)

COLORADO

People v. Arnold, 186 Colo. 372, 527 P.2d 806 (1974) (en banc) (exigent circumstances are always present in searches for narcotics justifying entry without knock and announce)

CONNECTICUT

State v. Pelletier, 209 Conn. 564, 552 A.2d 805 (1989) (possibility of physical peril to officers executing search warrant justified any noncompliance with knock-and-announce requirement)

DELAWARE

Dunfee v. State, 346 A.2d 173 (Del. 1975) (good-faith police belief that compliance will increase their peril, frustrate the arrest, or permit destruction of evidence justifies unannounced entry)

DISTRICT OF COLUMBIA

Poole v. United States, 630 A.2d 1109 (D.C. App. 1993), *cert. denied*, 115 S.Ct. 160 *and* 115 S.Ct. 166 (1994) (reasonable belief that the defendant may be armed and use arms against officers justified noncompliance with knock-and-announce requirement)

FLORIDA

State v. Bamber, 630 So.2d 1048 (Fla. 1994) (particular facts are necessary to show exigent circumstances)

State v. Price, 564 So.2d 1239 (Fla. Dist. Ct. App. 1990) (belief that compliance with the knock-and-announce rule will increase peril to the police justifies noncompliance with the knock-and-announce requirement where the police knew the defendant had a history with concealed weapons)

GEORGIA

Scull v. State, 122 Ga. App. 696, 178 S.E.2d 720 (1970) (police believed that the guns were in the apartment and the evidence (heroin) would be easily destroyed creating exigency that justified noncompliance with knock-and-announce rule)

HAWAII

State v. Davenport, 55 Haw. 90, 516 P.2d 65 (1973) (failure to knock and announce is justified in searches for drugs since drugs are easily destroyed)

IDAHO

State v. Rauch, 99 Idaho 586, 586 P.2d 671 (1978) (recognized exigent circumstances exception to knock-and-announce requirement)

ILLINOIS

725 I.L.C.S. 5/108-8(b) (West 1994) (no-knock warrant)

People v. Seaberg, 262 Ill.App. 3d 79, 635 N.E.2d 126 (1994) (police knowledge of the defendant's possession of a gun and reasonable belief that the defendant may use the gun against officers or third parties justified failure to knock and announce)

INDIANA

Crabtree v. State, 479 N.E.2d 70 (Ind. Ct. App. 1985) (police belief that drugs were being destroyed justified failure to knock and announce)

IOWA

State v. Cohrs, 484 N.W.2d 223 (Iowa Ct. App. 1992) (exigent circumstances allowed; belief of police that drugs were being destroyed justified failure to knock and announce)

KANSAS

State v. Tyler, 251 Kan. 616, 840 P.2d 413 (1992) (Kansas has not adopted a knock-and-announce requirement)

KENTUCKY

Commonwealth v. Gross, 758 S.W.2d 436 (Ky. 1988) (when exigent circumstances exist, a search warrant can be executed without knock and announce)

LOUISIANA

State v. Viera, 449 So.2d 644 (La. Ct. App. 1984) (belief of police that marijuana would be easily destroyed justified failure to knock and announce)

MAINE

State v. Hider, 649 A.2d 14 (Me. 1994) (no knock-and-announce requirement in Maine)

MARYLAND

Waugh v. State, 3 Md. App. 379, 239 A.2d 596 (1968) (police belief that under the circumstances drugs will be destroyed justifies failure to knock and announce)

MASSACHUSETTS

Commonwealth v. Scalise, 387 Mass. 413, 439 N.E.2d 818 (1982) (belief of police that drugs will be quickly and easily destroyed justifies failure to knock and announce; the court rejected a blanket rule that would permit no-knock entries whenever the object of the search by its nature could be easily destroyed)

MICHIGAN

People v. Kerschner, 132 Mich. App. 623, 348 N.W.2d 282 (1987) (police have no duty to announce when doing so would permit an escape, would endanger the safety of the police or public, or would lead to destruction of material evidence)

MINNESOTA

State v. Valento, 405 N.W.2d 914 (Minn. Ct. App. 1987) (belief that home was being used for a drug business justified unannounced entry by police pursuant to warrant to that effect)

MISSISSIPPI

Miss. Code Ann. § 41-29-157(c) (1993) (no-knock allowed in drug cases)

MISSOURI

State v. Parrish, 852 S.W.2d 426 (Mo. Ct. App. 1993) (knowledge by police that the defendant drew a weapon on an undercover officer two hours earlier justified police noncompliance with knock-and-announce statute)

NEBRASKA

Neb. Rev. Stat. § 29-411 (1993) (judge may issue no-knock warrant)

State v. Meyer, 209 Neb. 757, 311 N.W.2d 520 (1981) (magistrate may issue a no-knock warrant upon proof that evidence sought will be easily destroyed if police knock and announce prior to entry)

NEW HAMPSHIRE

State v. Matos, 135 N.H. 410, 605 A.2d 223 (1992) (exigent circumstances exist where small quantities of narcotics are being packaged and in a residence with traditional plumbing facilities)

NEW JERSEY

State v. Love, 233 N.J.Super. 38, 558 A.2d 15 (1989)(unannounced entry justified where immediate action is required to preserve evidence, knocking would increase peril to officer, or the arrest would be frustrated)

NEW MEXICO

State v. Ortega, 117 N.M. 160, 870 P.2d 122 (1994) (potential for destruction of drug evidence is enough to justify unannounced entry)

State v. Attaway, 117 N.M. 141, 870 P.2d 103 (1994) (exigent circumstances, including risk of danger to officers, may excuse compliance with knock-and-announce requirement)

NEW YORK

N.Y. Crim. Proc. L. § 690.35(3)(b) (West 1995) (no-knock warrant)

People v. Atkinson, 122 A.D.2d 385, 505 N.Y.S.2d 203 (1986) (issuance of no-knock warrant was appropriate where object of search was drugs which could easily be destroyed)

NORTH CAROLINA

State v. Prevette, 43 N.C. App. 450, 259 S.E.2d 595 (1979), *cert. denied,* 447 U.S. 906 (1980) (exigent circumstances sufficient for warrantless search also sufficient for unannounced entry)

NORTH DAKOTA

State v. Sakellson, 379 N.W.2d 779 (N.D. 1985) (exigent circumstances may justify unannounced entry, none present)

OKLAHOMA

Gamble v. Oklahoma, 546 P.2d 1336 (Okla. Crim. App. 1976) (where the facts showed that the defendant was aware of the authority and the presence of the police, knocking and announcing would have been a useless gesture therefore noncompliance with the knock-and-announce requirement excused)

OREGON

State v. Ford, 310 Or. 623, 801 P.2d 754 (1990) (officers' reasonable apprehension of peril justified unannounced entry)

PENNSYLVANIA

Commonwealth v. Bull, 422 Pa. Super. 67, 618 A.2d 1019 (1993) (exigent circumstances recognized, none shown in case)

RHODE ISLAND

State v. Johnson, 102 R.I. 344, 230 A.2d 831 (1967) (because the object of the search was heroin which is easily destroyed, any noncompliance with knock-and-announce requirement was justified)

SOUTH DAKOTA

S.D.C.L. § 23A-35-9 (1994) (no-knock warrant)

State v. Steingraber, 296 N.W.2d 543 (S.D. 1980) (failure of police to knock and announce while entering an enclosed porch did not violate knock-and-announce statute where the officer substantially complied with statute by announcing purpose while entering living quarters of home in full view of residents)

TENNESSEE

Keith v. State, 542 S.W.2d 839 (Tenn. Crim. App. 1976) (police's reasonable belief that the occupants of place to be searched were destroying drug evidence excused any noncompliance with knock-and-announce requirement)

TEXAS

Ellerbee v. State, 631 S.W.2d 480 (Tex. Crim. App. 1981) (police belief that drugs were about to be destroyed justified failure to knock and announce)

UTAH

Utah Code Ann. § 77-23-210(2) (Michie 1994) (no-knock provision)

State v. Lee, 863 P.2d 49 (Utah Ct. App. 1993) (issuance of no-knock search warrant appropriate where target of search (drugs) may be easily destroyed)

State v. Rosenbaum, 845 P.2d 962 (Utah Ct. App. 1993) (no-knock search warrant appropriate where drugs may be destroyed and firearms had been observed at the residence)

VERMONT

State v. Ogden, 640 A.2d 6 (Vt. 1993) (noncompliance with knock-and-announce requirement justified where police reasonably believe that awaiting a reply would jeopardize the safety of officers)

VIRGINIA

Heaton v. Commonwealth, 215 Va. 137, 207 S.E.2d 829 (1974) (per curiam) (where police reasonably believe that evidence (drugs) will be destroyed if knock-and-announce requirement is complied with, unannounced entry is excused)

Commonwealth v. Woody, 13 Va. App. 168, 409 S.E.2d 170 (1991) (officers failure to comply strictly with knock and announce excused where unannounced entry was necessary to prevent the destruction of evidence)

WASHINGTON

State v. Allen, 40 Wash. App. 27, 696 P.2d 45 (1985) (police knowledge of the defendant's possession of firearms and possibility that the defendant would use firearms against the police justified unannounced entry)

WISCONSIN

State v. Stevens, 181 Wis.2d 410, 511 N.W.2d 591 (1994), *petition for cert. filed* (U.S. No. 93-9026) (May 4, 1994) (no-knock entry justified when police reasonably believe that announcement of their presence would endanger their safety, or that of others, or when police reasonably believe that unannounced entry is required to prevent destruction of evidence)

State v. Watkinson, 161 Wis.2d 750, 468 N.W.2d 763 (Wis. Ct. App. 1991) (issuance of no-knock warrant appropriate where police had information that the defendant had a revolver in his residence)

WYOMING

Lobatos v. State, 875 P.2d 716 (Wyo. 1994) (issuance of no-knock search warrant appropriate where police information obtained in advance shows reasonable cause to believe exigent circumstances exist which would endanger the successful execution of the warrant)

Supreme Court, U.S.
FILED
MAR 17 1995
OFFICE OF THE CLERK

No. 94-5707

In The

Supreme Court of the United States

October Term, 1994

SHARLENE WILSON,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

On Writ Of Certiorari
To The Arkansas Supreme Court

PETITIONER'S REPLY BRIEF

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March 17, 1995

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ARGUMENT

I. AT BEST, A BALANCING OF INTERESTS ANALYSIS RESULTS IN THE BALANCE TIPPING IN FAVOR OF A CONSTITUTIONAL REQUIREMENT OF ANNOUNCEMENT.

A. The State's argument is premised on flawed assumptions.

The State's argument ultimately flows from three erroneous assumptions: (1) a citizen's "privacy interests are only slightly advanced by a knock-and-announce rule" (Resp.Brief at 15-16); (2) a balancing of interests already performed by the magistrate has decided that the citizen's privacy interest is to be ceded to the police for the purposes of the entry and search (*id.* at 10-17); and (3) the police are never wrong and never search the wrong house in boldly stating that a civil remedy is the sure cure for any violation of the knock-and-announce rule (*id.* at 32).

The privacy in one's home is the highest right known in American law. Nevertheless, the State here attempts to belittle this right at every turn in its brief in the name of "reasonableness" and the "war on drugs." In the process of balancing and overall reasonableness, however, its choice of what it weighs helps it arrive at its preconceived answer.[1]

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[1] *United States v. Rabinowitz*, 339 U.S. 56, 68-69 (1950) (FRANKFURTER, J., dissenting) (bracketed material added):

> It is true also of journeys in the law that the place you reach depends upon the direction you are taking. And so, where one comes out on a case depends on where one goes in. It makes all the difference in the world whether one approaches the Fourth Amendment as the Court approached it in [*Boyd, Weeks, Silverthorne,* and *Gouled*], or one approaches it as a provision dealing with a formality. It makes all the difference in the world whether one recognizes the central fact about the Fourth Amendment, namely, that it was a safeguard against

> [T]he Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable. . . . What is reasonable, of course, "depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." . . . Thus, the permissibility of a particular practice "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."

Skinner v. Railway Labor Executives Asso., 489 U.S. 602, 618 (1989).

Even *Dalia v. United States*, 441 U.S. 238 (1979), is not as all-inclusive as the State says when it states that executing officers have the discretion to determine how to execute a search warrant. Indeed, Officers are still subject to the Fourth Amendment's reasonableness requirement.[2]

B. The important interests served by the common law knock-and-announce rule.

The knock-and-announce rule is not some revolutionary concept or some impediment erected to stall the State's "war on drugs." The knock-and-announce rule was around long before drugs. (It is highly ironic that one petty drug dealer's case is our government's vehicle to seek to nullify 720 years

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recurrence of abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution, or one thinks of it merely as a requirement of a piece of paper.

[2] *Dalia, supra*, at 257: "Nothing in the language of the Constitution or in this Court's decisions interpreting that language suggests that, in addition to the three requirements discussed above, search warrants also must include a specification of the precise manner in which they are to be executed. On the contrary, it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant—subject of course to the general Fourth Amendment protection 'against unreasonable searches and seizures.'"

of the common law.)

The question here ultimately is whether this part of the common law is subject to being nullified in the name of law and order. The choice was made for us when the Constitution and the Bill of Rights were adopted; not by the police in fighting the "war on drugs."

The State belittles the salutary and decidedly important purposes of the rule of protection of privacy, property, and life of all concerned. Does the knock-and-announce rule only "slightly advance[]" privacy? Resp.Brief at 15-16. Privacy is not so easily quantified and diminished solely by state action. The Fourth Amendment protects people and their expectations of privacy and not places. *Katz v. United States*, 389 U.S. 347, 351 (1967). Once there is a Fourth Amendment expectation of privacy, there is no de minimis rule on whether it exists. After all, "[a] search is a search, even if it happens to disclose nothing." *Arizona v. Hicks*, 480 U.S. 321, 325 (1987).

C. Whose protection is more important? Officers, innocent citizens, or both?

The State goes to great extremes to show that the protection of police officers should be the Court's only concern in whether there should be a knock-and-announce rule. Its myopic law enforcement-protectionist view of what purposes the Fourth Amendment serves in the overall scheme of American life causes it to read "protection of life" as "protection of police." What about the innocent citizens of this country? Do the police *never* make mistakes when they execute drug search warrants? Hardly.

1. Protection of Innocent Citizens

It is settled that the Fourth Amendment protects the law-abiding as well as the law breaker. *See, e.g., Weeks v. United States*, 232 U.S. 383, 392 (1914); *Go-Bart Importing*

Co. v. United States, 282 U.S. 344, 357 (1931); *Kimmelman v. Morrison,* 477 U.S. 365, 374 (1986). This concept and protection against mistakes and the rights of innocent third persons is an integral part of the policy underlying both the knock-and-announce rule; *Miller v. United States,* 357 U.S. 301, 314 (1958); *Ker v. California,* 374 U.S. 23, 33 (1963); and the particularity requirement. *United States v. Chadwick,* 433 U.S. 1, 9-10 (1977). Nowhere in the Fourth Amendment, however, is protection of the innocent more important than right here because of the nature of the intrusion and the governmental admissions throughout the briefs in this case that force and violence will be used in drug searches.

The State would have us believe, however, that police officers never make mistakes in deciding not only whose property to search but how to do it, so protection of the innocent serves no purpose as it balances away the "right of the people to be secure."

The nature of criminal cases is such that few cases come to this Court where the wrong place was searched.[3] There are a few civil cases in the lower courts involving searches of the wrong place, but they show that there is no effective civil remedy. *See* Part VI, *infra.*

But, what about innocent citizens who are victims of overzealous police officers executing warrants without warning? The State apparently pretends that this problem either does not exist or it is of no constitutional consequence. It is real, it effects the innocent more than the guilty, and the empirical data cannot be ignored:

> The Fourth Amendment also influences how police may conduct searches. As early as 1603, English courts recognized that law officers were obliged to knock and announce their purpose before entering a private citizen's home. . . .
>
> Unfortunately, contemporary law enforcement practices have turned back the clock to an era prior to the landing of the *Mayflower*. Police now routinely use battering rams to conduct surprise raids. In Atlanta, in November 1991, local police battered down a suspected drug dealer's apartment door and shot and killed an eight-year-old boy (Xavier Bennett, Jr.) in the resulting cross fire. . . . In 1991 Garland, Texas, police dressed in black and wearing black ski masks[4] burst into a trailer, waved guns in the air, and kicked down the bedroom door where Kenneth Baulch had been sleeping next to his seventeen-month-old son. A policeman claimed that Baulch posed a deadly threat because he held an ashtray in his left hand, which explained why he shot Baulch in the back and killed him. (A police internal investigation found no wrongdoing by the officer.) In March 1992 a police SWAT team killed Robin Pratt, an Everett, Washington, mother in a no-knock raid carrying out an arrest warrant for her husband. (Her husband was later released after the allegations upon which the arrest warrant were based turned out to be false.) The *Seattle Times* summarized the police raid:
>
> Instead of using an apartment key given to them, SWAT

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[3] One ready example is *Maryland v. Garrison,* 480 U.S. 79 (1987) (officers entered the wrong apartment, but it was objectively reasonable given the configuration of the apartment building, the independent investigation as to how many tenants there were in the building, the lack of objection from the occupants who were present during the search, and the fact the officers immediately exited when they learned they were in the wrong one).

[4] Note that the State argues that early untrained constables could not readily be identified by citizens, so the common law rule was entitled to be more restrictive. Resp.Brief at 20, 23. However, today's drug raids are often conducted by black-dressed "ninja narcs," with their faces covered like robbers, or by plainclothed narcotics officers. Narcotics officers hardly ever have uniform officers around except as backup. That even happened here. The net result is that the raiding party may easily be misidentified as robbers. That recently happened in Little Rock. *See* text accompanying note 7, *infra.*

members threw a 50-pound battering ram through a sliding-glass door that landed near the heads of Pratt's 6-year-old daughter and 5-year-old niece. As [policeman] Aston rounded the corner to the Pratts' bedroom, he encountered Robin Pratt. SWAT members were yelling, "Get down," and she started to crouch onto her knees. She looked up at Aston and said, "Please don't hurt my children." . . . Aston had his gun pointed at her and fired, shooting her in the neck. According to Muenster, she was alive another one to two minutes but could not speak because her throat had been destroyed by the bullet. She was handcuffed, lying face down.

Citizens are prosecuted for defending themselves or their homes against plainclothes policemen conducting no-knock raids. In 1986 William Grass of Kentucky was sentenced to two years in prison for firing a bullet through a door and wounding a SWAT team officer who was forcibly entering his residence late at night without knocking in order to search his house. A Boston narcotics agent was shot and killed by a citizen as he and other policemen tried to batter down Albert Lewin's door in a no-knock raid in 1989. The government sought to prosecute Lewin for murder but a judge threw the case out after a policemen admitted he lied in order to get the search warrant to conduct the raid.[5]

At 2:00 a.m. on January 25, 1993, police smashed down the door and rushed into the home of Manuel Ramirez of Stockton, California. Ramirez awoke, grabbed a pistol, and shot and killed one policeman by his bedroom door before other police killed him. The police were raiding the house based on a tip that drugs were on the premises, but they found no drugs. . . .

In 1989 Titusville, Florida, policemen conducted a night-time no-knock drug raid on the home of fifty-eight-year-old painter Charles DiGristine. The raid began as the police set

[5] *See Commonwealth v. Lewin*, 407 Mass. 617, 555 N.E.2d 551 (1990), earlier opinion 405 Mass. 566, 555 N.E.2d 557 (police officers lied about informant to get search warrant).

off a concussion grenade and then smashed through DiGristine's front door. DiGristine's wife screamed; he hurried to his bedroom to get a pistol; a man dressed in dark clothing and a black mask crashed into his bedroom; gunfire was exchanged; and the policeman was fatally wounded. The local government prosecuted DiGristine for first-degree murder, but a jury acquitted him. (The police believed—based on bogus information from a single anonymous information—that the DiGristine home was a center for heavily armed drug dealers; the only drug they found in the raid was a small amount of marijuana owned by DiGristine's sixteen-year-old-son.)

. . . DEA agents used an ax to break down the door of an innocent Guthrie, Oklahoma, man in 1991 and then handcuffed and kicked the man in front of his wife and daughters before they realized they were at the wrong address; the agents left without apologizing. The *San Diego Tribune* noted in 1992, "In July, an informant bum tip led San Diego police to storm a Logan Heights home. The residents say their daughters were subjected to genital searches while a gun was held to the head of their 6 year old son. No drugs were found."

On August 25, 1992, Customs Service officials and local police raided the San Diego home of businessman Donald Carlson, setting off a bomb in his backyard, smashing through his front door, and shooting him three times after he tried to defend himself with a gun. Police even shot Carlson in the back after he had given up his gun and was lying wounded on his bedroom floor. The Customs Service believed that there were four machine guns and a massive cache of illegal narcotics in Carlson's home. Carlson related in congressional testimony in 1993 that even after agents failed to find any drugs, "No one offered me medical assistance while I lay on the floor of my bedroom. . . . Eventually, paramedics arrived, and took me to the hospital. I was kept in custody under armed guard and shackled for several days at the hospital. During that time, I was aware of hospital personnel referring to me as a criminal, of police officers and agents coming into my room, and the like." The raid was launched based on a

tip from a paid informant named Ron, who later told the *Los Angeles Times* that he had never formally identified any specific house to be searched. (The DEA had previously dealt with Ron and considered him unreliable.) Customs officials had the home under surveillance for many hours before they launched their raid; even though they got a search warrant based on their assertion that the house was a vacant drug storehouse, the raid was carried out even after it became obvious that Carlson was living a normal life there. The agents could easily have arrested Carlson when he arrived home at 10:00 p.m. but instead watched and waited to attack until after midnight, when Carlson was asleep, in order to maximize the surprise. . . . Carlson surmised that his house was raided in part because federal agents hoped to seize it under asset forfeiture provisions: "That kind of financial incentive may well have played a real role in the conduct of federal agents in raiding my home and in ignoring every sign that day that they were in the wrong place." A *San Diego Union-Tribune* analysis of the raid concluded that it occurred partly as a result of "heavy pressure from Customs managers—who stand to gain professionally by generating arrests and big caseloads—on street agents to produce headline-grabbing cases."[6]

J. BOVARD, LOST RIGHTS 234-37 (1994) (footnotes omitted; bracketed footnotes added). A less detailed litany citing some of the same occurrences and others appears in Note, *The Knock and Announce Rule: A New Approach to the Destruction of Evidence Exception*, 93 COLUM.L.REV. 685, 705 (1993).

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[6] Carlson's case is also discussed in M. Curriden, "Informer's Lies Trigger a Tragedy," *Nat'l L.J.*, March 6, 1995, A1, A25 (it took nearly a year and a half for the government to admit its error and settle with him).

The *National Law Journal* just completed a three-part series (running in its issues of February 20 & 27 and March 6, 1995) called "The Informant Trap" on how government has relied too heavily on lying informants or even on totally fictional informants in the "war on drugs."

> Over one hundred newspaper articles, reproduced in the Congressional Record described a repeated scenario: terrified citizens, thinking themselves targets of burglary or more frightening acts, discovered that they were instead being searched by law enforcement officers ho had entered their homes without notice. In an exhaustive eight-week investigation by the *New York Times*, consisting of interviews with victims of "no-knock" raids, reporters found that "[i]nnocent Americans around the country have been subjected to dozens of mistaken, violent and often illegal police raids by local, state and Federal narcotics agents in search of illicit drugs and their dealers."

Note, *supra*, at 705, citing A. Malcolm, "Violent Drug Raids Against the Innocent Found Widespread," *N.Y. Times*, June 25, 1973, at A1, A22.

2. Protection of Officers

What about protection of the officer? The State argues that FBI "statistics bear out that Arkansas' procedures maximize officer safety. From 1980 to 1993, no Arkansas police officers were killed investigation drug-related offenses or executing search warrants." Nationally, however, 16 officers were killed in that 14 year period. Resp.Brief at 13-14 n.7. The State's brief was filed February 23, 1995.

On February 7, 1995, a Little Rock Police Officer was killed and another shot in the head during a "routine drug raid" when they were shot by a homeowner claiming he was only defending himself when his door burst open without warning.[7] The shooter in that case, Willie L. Green, was a victim of an armed robbery of his apartment just a month

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[7] J. Kordsmeier, "LR officer slain, 2nd shot at door in drug search," *Arkansas Democrat-Gazette*, Feb. 8, 1995, at 1A, 8A; C. Reinolds & J. Sandlin, "'He was ready,' police chief says of alleged killer," *Arkansas Democrat-Gazette*, Feb. 9, 1995, at 1A, 10A; M. Leverett, "Dying for Evidence," *Arkansas Times*, March 3, 1995, at 10-11.

earlier,[8] and the raiding officers were aware of it.[9] The officers, as to be expected, claimed that they announced their presence.[10] Green, however, immediately claimed that he never heard the officers identify themselves, he was only defending himself, and he had plenty of justification to fear for his own safety. The official police version would have us believe that Green shot deliberately to protect his small stash of marijuana while two small children were in the same room. LRPD admits that it *daily* uses the tactic of announcing when the officers hit the door just for surprise, not before,[11] just like in this case. This is just the first time an officer got shot.

So, just how safe is it to announce in the midst of the entry when the banging down the door drowns out the voices of the officers telling the occupant their identity and purpose?

D. *Curtis' Case* and the common law understanding supports applying the rule under the Fourth Amendment.

Respondent finds *Curtis' Case*, 1 Fost. 135, 168 Eng. Rep. 67 (K.B.1757), a "poor example of [*Semayne's*] rule's operation" and a "tenuous foundation" for the knock-and-announce rule. Resp.Brief at 21. To the contrary, *Curtis' Case* is compelling on the common law issue: Knowing the consequences of the death of an officer serving the warrant, the rule was still incorporated into American law. If anything, that case underscores the common law understanding of the purpose of the rule in protection of life.

[8] In footnote 48 of Petitioner's Brief, she notes a January 21, 1995 Little Rock news article which relates to this robbery of Green (showing it on a front page map) and an LRPD officer's admonition to shoot to kill those who enter homes by force.

[9] *See* articles in note 7, *supra*.

[10] After all, how could they make a capital murder charge stick against Green?

[11] M. Leverett, *supra*, at 11.

II. THE DECISION TO ISSUE A WARRANT NEVER ENDS THE INQUIRY AS TO WHETHER THE FOURTH AMENDMENT IS VIOLATED; IT IS ONLY ONE PRONG OF THE FOURTH AMENDMENT INQUIRY. REASONABLENESS IS ALWAYS AN ISSUE.

The State argues that once the decision to issue a warrant has been made, all the rights of the individual take a back seat to the rights of the government to conduct a search. This overlooks the fundamental reasonableness requirement of the Fourth Amendment. The way a warrant is executed is always at issue. *See, e.g., Winston v. Lee*, 470 U.S. 753, 759 (1985) (the proposed search by surgery would be unreasonable even if it would produce evidence of crime; some rights are higher than the state's interest in obtaining evidence of crime); *Zurcher v. Stanford Daily*, 436 U.S. 547, 559-60 (1979). *See also Terry v. Ohio*, 392 U.S. 1, 28 (1968) ("The manner in which the [search] . . . [was] conducted is, of course, as vital a part of the inquiry as whether [it was] warranted at all."); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 687 (1989) (the invasive nature of urine testing could make is unreasonable in some cases when the nature of the invasion is balanced against its need). *Cf. Welsh v. Wisconsin*, 466 U.S. 740 (1984) (although warrantless entry would produce evidence of drunk driving, officer cannot enter driver's home in hot pursuit in a misdemeanor case).

III. THE PROPOSED BLANKET RULE VIOLATES THE PROBABLE CAUSE REQUIREMENT OF THE FOURTH AMENDMENT. THERE MUST BE OBJECTIVE FACTS SUPPORTING INVOKING AN EXCEPTION.

The respondent and all its *amici* seek a blanket rule exempting drug searches from the reach of the knock-and-an-

nounce rule. They seek to turn the "possible destruction of evidence" exception, which petitioner concedes the common law recognizes, into the "drug exception" or the "indoor plumbing exception" to the knock-and-announce requirement. Without a *factual* basis for believing that there is a reason to invoke an exception under the totality of the circumstances, a blanket rule would be unreasonable.

A. This is not the case to decide this issue.

This case is here on the narrow question of whether the common law knock-and-announce rule is a part of the Fourth Amendment. The State here never relied on any exceptions below, and the record is less than clear on whether exceptions would apply, unless the blanket rule is adopted. Here, the State necessarily has to rely on the blanket exception since the officers executing the warrant never expressed any concern that any evidence would be destroyed and they possessed no information at all that there was any possibility of destruction of evidence.[12] If the State relies on the risk of violence because of the alleged threat on the informant and presence of the gun, why did they not have their own weapons drawn when they entered?

One case to likely resolve that issue is waiting in the wings in *Stevens v. Wisconsin,* petition for cert. pending, No. 93-9026, where the Wisconsin court held that there was a drug case exception to the knock-and-announce requirement. *State v. Stevens,* 181 Wis.2d 410, 511 N.W.2d 591, 594-96 (1994). If Petitioner prevails on the constitutional question here, *Stevens'* issue will still be open to question.

[12] Also, it should be remembered that the officers had warrants for petitioner's arrest for the class Y and C felonies of delivery of methamphetamine and marijuana. The officers were seeking possible stashes of methamphetamine and marijuana from which she could have delivered the drugs. Also, the officers were seeking the gun allegedly used to threaten the informant. Curiously, petitioner was never charged with being a felon in possession of a firearm for allegedly carrying the gun, but her husband was. She was charged with terroristic threatening of the informant, but that charge simply disappeared.

B. There should be objective evidence under the totality of circumstances to invoke an exception.

If the Court must reach this issue, it should be noted that granting law enforcement officers "engaged in the often competitive enterprise of ferreting out crime"[13] leads to great mischief and has overwhelming potential for abuse in the area of knock-and-announce. *See* Point I.C.1., *supra,* and Point V.B., *infra.*

Of the three exceptions to the knock-and-announce requirement, the potential for violence will usually be known in advance and provided to the magistrate in the warrant application. After all, a weapon in close proximity to drugs is a separate federal crime with a five year mandatory minimum sentence. 18 U.S.C. § 922(c)(1). It thus behooves the officer to include such information in the affidavit for the warrant. Indeed, such information was provided here, even though it apparently lacked all credibility.

In Arkansas at least, the potential for destruction of evidence is included in a request for a nighttime search under Ark.R.Crim.P. 13.2(c) (1993), and a specific need for a nighttime search must be shown by probable cause. *See* Petr's Brief at 24 n.7. Officers will often know about the potential for destruction of evidence in advance, but circumstances at the time of the search, such as suspicious sounds indicating potential destruction of evidence, could provide justification for an immediate entry without giving the home-

[13] *Johnson v. United States,* 333 U.S. 10, 14 (1948), quoted in *United States v. Leon,* 468 U.S. 897, 914 (1984), and *Illinois v. Krull,* 480 U.S. 340, 351 (1987), and cited in *Arizona v. Evans,* 1995 U.S. Lexis 1806, *27.

owner the opportunity to surrender his privacy to the warrant.

The useless gesture exception can arise at the time of execution of the warrant, but it can also be known in advance, where, for example, the suspect is in custody or out-of-town and the officers have no reason to believe that anyone is at home.

C. What justification must be provided?

At any rate, what is the justification that the officers will have to provide in the warrant application or post hoc to justify invoking an exception? The probable cause standard of *Illinois v. Gates*, 462 U.S. 213 (1983), with its totality of circumstances test readily comes to mind and would be the easiest to apply and still protect the rights of innocent citizens. Without such a standard, any blanket rule would violate the protection against unreasonable searches embodied in the first clause of the Fourth Amendment.[14]

IV. THE INEVITABLE DISCOVERY EXCEPTION DOES NOT APPLY.

The State's and its *amici's* arguments concerning application of the inevitable discovery exception completely overlook the concept of reasonableness of any search and seizure. So the argument goes: "A warrant has been issued. Therefore, we would find the sought-after evidence no matter how we violate the Fourth Amendment in the process of execution of the warrant." Inevitable discovery has nothing to do, however, with the rights of innocent citizens who are subjected to a violation of their right to announcement. To invoke the exception presupposes a constitutional violation.

[14] "The right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures, shall not be violated . . . ."

See, e.g., Murray v. United States, 487 U.S. 533, 539 (1988); *Nix v. Williams*, 467 U.S. 431, 444 (1984); *United States v. Crews*, 445 U.S. 463, 471 (1980).

The State seeks to gloss over the argument that the "but for" test of inevitable discovery has no application here; the premature entry is not the "but for" of the finding of the evidence. This argument proves too much, because the State wants it both ways. It says that the search cannot be successfully completed without dispensing with announcement because the person whose property is being searched would flush the drugs. If so, then dispensing with announcement is, in fact, a "but for" cause of finding the drugs, and that is, in further fact, the motive for not announcing. Therefore, the State's claim of inevitable discovery inevitably contradicts the claim of exigent circumstances.

V. THE GOOD FAITH EXCEPTION SHOULD NOT BE APPLIED UNDER *KRULL* AND *EVANS*.

Petitioner never seeks to invoke the exclusionary rule in this Court. We only seek a remand to the Arkansas Supreme Court to resolve that issue. The State and *amici*, however, seek to invoke the good faith exception of *Illinois v. Krull*, 480 U.S. 340 (1987), to sustain the search.

This case falls within an "exception" to the good faith exception, so it should not be applied.

A. The constitutionality of the knock-and-announce rule must still be decided first.

The good faith exception cases make it clear that the basic constitutional issue should be decided first. *United States v. Leon*, 468 U.S. 897, 924 & n. 25 (1984); *Krull, supra*, at 353-54.

B. The pattern of abuse of the knock-and-announce requirement precludes adoption of the good faith exception.

On the surface, the good faith exception has great appeal in this case, and *Krull* seems to control. After all, the Arkansas Supreme Court adopted the rule, and Arkansas courts have previously rejected any knock-and-announce requirement. Nevertheless, the known abuses of the knock-and-announce requirement recounted in Part I.C.1., *supra,* demonstrates that the inherent potential for lawlessness of the police in knock-and-announce cases precludes application of the good faith exception.

All the good faith exception cases starting with *Leon, supra,* at 916[15] & n.14. and continuing on to *Krull, supra,* at 351,[16] and *Arizona v. Evans,* 1995 U.S. Lexis 1806, *26,[17] hold that abuses of power of the person to be "deterred" can justify not invoking the good faith exception. This is precisely the kind of case envisioned in those cases for not applying the good faith exception.

The policies underlying the knock-and-announce requirement are substantial. Petr's Brief at 57-63. The risks of error, however, are too great in the numbers of innocent persons subjected to searches of their property and invasions of their privacy. In addition, the consequences of error are substantial, and they can even be fatal in the numbers of persons physically harmed by a failure to properly announce.

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[15] "[T]here exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion."

[16] "Thus, we are given no basis for believing that 'lawlessness among these actors requires application of the extreme sanction of exclusion.' *United States v. Leon,* 468 U.S., at 916.

[17] "[R]espondent offers no evidence that court employees are included to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion. See *Leon, supra* at 916, and n. 14; see also *Krull, supra* at 350-351."

Some state cases have held that the knock-and-announce requirement is not subject to the good faith exception. *People v. Neer,* 177 Cal.App.3d 991, 223 Cal.Rptr. 551, 561 (4th Dist.1986); *State v. Sakkelson,* 379 N.W.2d 779, 784-85 (N.D.1985).

VI. THERE IS NO VIABLE CIVIL REMEDY FOR VIOLATIONS OF THE KNOCK-AND-ANNOUNCE RULE.

Those who want to do away with the exclusionary rule often cite the existence of a potential civil remedy.[18] *See* Resp.Brief at 32,[19] Calif.Am.Brief at 21. Even the "Contract on America" includes a civil remedy on its unconstitutional repeal of the exclusionary rule in warrantless searches. S. 3, § 507 (104th Cong., 1st Sess.).

This is, at best, a disingenuous argument for two reasons. First, the State argues that there is no constitutional right involved in a failure to announce. If so, there can be no civil action. Second, those who litigate in this area know that there is no viable civil remedy, even for the innocent victims of government excess. The case law under *Maryland v. Garrison* already holds that there is no civil remedy for searching the wrong house unless the officers virtually knowingly do so, thereby sacrificing their qualified immunity. *See, e.g., Richardson v. Oldham,* 12 F.3d 1373 (5th Cir. 1994); *Samuels v. Smith,* 839 F.Supp. 959 (D.Conn.1993); *Linley v. DeMoss,* 83 Ohio App.3d 594, 615 N.E.2d 631 (10th Dist.1992). In addition, there apparently is no private right of action for a violation of 18 U.S.C. § 3109. *Rivera*

---

[18] *See, e.g., Bivens v. Six Unknown Agents,* 403 U.S. 388, 413 (1971) (BURGER, C.J., dissenting).

[19] "Surely a better remedy lies in the civil law for remonstrance of the hypothetically unreasonable behavior related to the taking command than by exclusion of evidence reasonably seized pursuant to a valid warrant."

v. United States, 728 F.Supp. 250 (S.D.N.Y.), *aff'd in part, vacated in part,* 928 F.2d 592 (2d Cir.1990). *A fortiori,* how could a person who is guilty of a crime conceivably expect to have a claim or persuade a jury that their violation of rights is worth any damages?

CONCLUSION

The judgment of the Arkansas Supreme Court should be reversed and the cause remanded.

Respectfully submitted,

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FOR ARGUMENT

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OCTOBER TERM, 1994

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STATE OF ARKANSAS — RESPONDENT

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARKANSAS

SUPPLEMENTAL BRIEF FOR THE RESPONDENT

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SUPPLEMENTAL BRIEF FOR THE RESPONDENT

Respondent submits this supplemental brief pursuant to Rule 25.5 to discuss the applicability of *Arizona v. Evans*, No. 93-1660, 63 U.S.L.W. 4179 (U.S. March 1, 1995), which was decided after Respondent's Brief was filed. *Evans* concerned whether the exclusionary rule requires suppression of evidence seized incident to an arrest resulting from an inaccurate computer record. In declaring that the exclusionary rule was inapplicable where the error is attributable to court personnel, the Court reaffirmed the analytical framework employed by Respondent in section III of its brief.

1. The Court reaffirmed Respondent's contention (Resp.Br. 29-31) that suppression of evidence is not an automatic remedy for a violation of the Fourth Amendment. The Amendment itself "contains no provision expressly precluding the use of evidence obtained in violation of its commands[ ]" and the use of such evidence works no new constitutional wrong. *Evans*, 63 U.S.L.W. at 4182. Rather, the appropriateness of the exclusionary remedy, which is an inquiry "separate" from whether a violation has occurred, depends on its success in achieving its stated goal: "to safeguard against future violations of Fourth Amendment rights through the rule's general deterrent effect." *Id.* (citations omitted). Thus, even if petitioner in this case were to establish that the entry into her house was made in an unreasonable manner, she is not necessarily entitled to the suppression of any evidence seized in the warrant search of her house.

2. The Court further recognized, as Respondent's Brief asserts (Resp.Br. 31-32), that the exclusionary rule should be invoked only where its remedial objective of deterrence is "most efficaciously served[.]" *Evans*, 63 U.S.L.W. at 4183 (citation omitted). Exclusion of evidence for an unannounced entry

would not serve as a deterrent, given that the failure to knock and announce is not motivated by a desire to seize evidence -- the police already have a warrant that permits that seizure -- but instead by a desire to secure the scene to ensure the safe and effective execution of the warrant.

3. Finally, the Court reaffirmed *United States v. Leon*, 468 U.S. 897 (1984), and *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), which announced the good-faith exception to the exclusionary rule, as well as *Illinois v. Krull*, 480 U.S. 340 (1987), which extended the exception to objectively reasonable reliance on the constitutionality of a state statute which is subsequently declared unconstitutional. *Evans*, 63 U.S.L.W. at 4182-4183. These three precedents, taken together, bar the application of the exclusionary rule to this case. (Resp.Br. 33-34 & n.24.) Neither the Arkansas Rules of Criminal Procedure nor the Arkansas Supreme Court have imposed a knock-and-announce requirement on the execution of warrants, and the Arkansas Court of Appeals has declined to create one. *Dodson v. State*, 4 Ark. App. 1, 5-10, 626 S.W.2d 624, 626-629, *cert. denied*, 457 U.S. 1136 (1982). Officers who relied in good faith

on state law would have had no reason to believe that their conduct was improper.

In sum, *Evans* supports Respondent's argument concerning the unsuitability of suppression as a remedy for any hypothetical constitutional violation in this case.

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QUESTION PRESENTED

Whether police officers violated the Fourth Amendment when, in executing a valid search warrant, they entered petitioner's home without first knocking and announcing their identity and purpose.

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INTEREST OF THE UNITED STATES

This case presents the question whether and under what circumstances the Fourth Amendment requires law enforcement officers executing a valid search warrant to knock and announce their identity and purpose before entering the premises. The Court's analysis and resolution of that question is likely to affect the admissibility of evidence offered in federal criminal prosecutions. Accordingly, the United States has an interest in the proper resolution of the question presented.

STATEMENT

After a jury trial in Arkansas, petitioner was convicted of delivery of marijuana, delivery of metham-

phetamine, possession of drug paraphernalia, and misdemeanor possession of marijuana. She was sentenced to 31 years' imprisonment on the felonies and one year's imprisonment on the misdemeanor, and fined $11,000. The Arkansas Supreme Court affirmed. J.A. 72-77.

1. On December 30, 1992, petitioner sold marijuana to an informant acting at the direction of a narcotics task force of the Arkansas State Police. The previous month, petitioner and her boyfriend, Bryson Jacobs, had twice sold narcotics (either marijuana or methamphetamine) to the same informant. Both of those sales had occurred at petitioner's home in Malvern, Arkansas, which she shared with Jacobs. J.A. 7-8, 15-16, 50-51.

The December 30, 1992, sale was arranged when the informant phoned petitioner's home and asked about buying marijuana. Jacobs answered the phone and told the informant that petitioner would return in ten minutes. When the informant called back, petitioner arranged to meet her at a local store. After meeting at the store, the informant entered petitioner's car, and the two drove to a nearby store to make change. In the car, petitioner asked the informant if she was working for the police and directed the informant to lift her shirt to check for a hidden tape recorder. Petitioner also produced a semi-automatic pistol, waved it in the informant's face, and several times threatened to injure or kill the informant if she turned out to be working for the police. Petitioner then sold the informant a bag of marijuana for $35. J.A. 15-16, 50-52.

The following day, state police officers, based on probable cause to believe that narcotics and a firearm were present, applied for and obtained a warrant to search petitioner's home. J.A. 46-48, 50-52. The police

also obtained warrants for the arrests of petitioner and Jacobs. The affidavit supporting the arrest warrants stated that Jacobs had previously been convicted of arson and firebombing. J.A. 7-8. The search of the home, conducted that afternoon, yielded marijuana, methamphetamine, valium, narcotics paraphernalia such as syringes, records of narcotics sales, a .25-caliber semi-automatic firearm, and various rounds of ammunition. J.A. 49, 53.

2. In the trial court, petitioner moved to suppress the evidence seized from her home on various grounds, including that the officers had failed to knock and announce before entering petitioner's home. J.A. 17-18.[1] At a suppression hearing, two officers testified regarding that claim. Officer Henry Efird, on whose affidavit the search warrant had been issued, testified that he was the fourth of six officers to enter the home; that he was exiting his car when the first officer entered; that he did not know whether the first officers to enter had announced their identity and purpose; and that, when he entered, he was told that petitioner had fled to the bathroom, and he found her there. J.A. 38-40. Officer Roger Walls testified that he and Officer Steve Smith were the first officers to enter the home, and that they entered by opening an unlocked screen door, the main door already being open. Officer Walls testified that he and Officer Smith observed petitioner, Jacobs, and two other persons in the living room, and "[W]e identified ourselves as police officers and told them we had a search warrant and entered while we were doing that. * * * [W]e entered the house upon announcement." J.A. 40-42.

---

[1] Petitioner did not raise the knock-and-announce claim in her written motion to suppress, but did so orally at the suppression hearing immediately before the taking of testimony. J.A. 31.

Petitioner testified that she was in the bathroom at the time the police entered, that she heard no announcement, but that, hearing her son cry out, she left the bathroom and saw officers with guns drawn. J.A. 44-45. The district court summarily denied the suppression motion. J.A. 45.

3. On appeal to the Arkansas Supreme Court, petitioner argued that the seized evidence was admitted in violation of state and Fourth Amendment requirements that officers knock and announce before entering a home. The court noted that "[t]he testimony indicated that the officers entered the home while they were identifying themselves." J.A. 77. The court rejected the constitutional claim, noting that *Miller* v. *United States*, 357 U.S. 301 (1958), the sole case on which petitioner had relied, was inapposite, because it applied the federal announcement statute, 18 U.S.C. 3109. J.A. 77. The court concluded that "[t]here is no authority for [petitioner's] theory that the knock and announce principle is required by the Fourth Amendment." *Ibid.*[2]

SUMMARY OF ARGUMENT

The fundamental command of the Fourth Amendment is that searches and seizures be reasonable. That command extends not only to whether law enforcement agents have justification for a search or seizure, but also to the manner in which the search or seizure is conducted. An officer's announcement of his authority and

[2] The court also held that state law contained no knock-and-announce rule. On the contrary, the court noted, Arkansas law permits officers to "use such degree of force, short of deadly force, against persons, or to effect entry or to open containers as is reasonably necessary for the successful execution of the search warrant with all practicable safety." J.A. 77 (quoting Ark. R. Crim. P. 13.3).

purpose before entering a home to execute a warrant will often serve valid interests, including preventing violence and minimizing residents' surprise. In light of the long recognition of those interests by the common law, Congress, and the States, an officer's entry without an announcement of authority and purpose may be unreasonable under the Fourth Amendment if not adequately justified by the government's legitimate law enforcement interests.

There is, however, no absolute requirement that officers knock and announce before entering. As this and other courts have long recognized, officers may be able to establish a reasonable basis for entering a home without prior announcement, or simultaneously with an announcement. Those reasons include the need to avoid danger to the officers, to prevent the destruction of evidence, or to foil a suspect's escape. When the government shows that the officers had such a reasonable justification, the Fourth Amendment permits an unannounced entry to execute a search warrant.

The officers' entry of petitioner's home to execute a search warrant at the same time as they announced their purpose was reasonably justified in this case for two independent reasons. First, giving petitioner and her confederate Jacobs advance notice of a police entry could have placed the officers in physical peril. Officers entering the homes of drug traffickers often confront an unusually acute risk of violence, and awareness of that risk generally justifies an entry without prior announcement. Here, that risk was underscored by petitioner's threats to use her semi-automatic weapon to kill the informant, and by Jacobs' history of arson and firebombing. Second, if the police had given advance notice of their intent to enter, petitioner and Jacobs

could have taken the opportunity to destroy the readily disposable narcotics in the house that the officers sought to seize. In light of those concerns, the officers had reasonable justification for entering simultaneously with the announcement of their presence.

ARGUMENT

THE OFFICERS' ENTRY INTO PETITIONER'S HOME TO EXECUTE A VALID SEARCH WARRANT WAS LAWFUL

The question whether officers must announce their authority and purpose before entering a home to execute a search warrant must be answered by reference to the Fourth Amendment's requirement of reasonableness. An announcement of police authority before entering serves valid purposes, and it is unconstitutional to dispense with such notice without a reasonable basis. But the requirements of law enforcement make it reasonable in many cases to dispense with such an announcement in order to protect the safety of officers and others and to avoid the destruction of evidence. Because those considerations were present here, the entry in this case complied with the Constitution.

A. The Fourth Amendment Permits An Unannounced Entry To Execute A Search Warrant When Officers Have A Reasonable Justification For Making Such An Entry

1. The essential requirement of the Fourth Amendment is that searches and seizures be reasonable.[3] In

[3] The Fourth Amendment states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

assessing the reasonableness of a particular law enforcement practice, the Court "balanc[es] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Tennessee* v. *Garner*, 471 U.S. 1, 8 (1985) (quoting *United States* v. *Place*, 462 U.S. 696, 703 (1983)); *Maryland* v. *Buie*, 494 U.S. 325, 331 (1990); *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 588 (1983). The "balancing of competing interests" is "the key principle of the Fourth Amendment." *Michigan* v. *Summers*, 452 U.S. 692, 700 n.12 (1981).

Like other Fourth Amendment issues, the manner in which a search or seizure occurs is governed by the reasonableness requirement of the Fourth Amendment. *Garner*, 471 U.S. at 7-8; *Dalia* v. *United States*, 441 U.S. 238, 258 (1979); *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 559-560 (1978). The Court's examination of "the reasonableness of the manner in which a search or seizure is conducted" requires "balancing the extent of the intrusion against the need for it." *Garner*, 471 U.S. at 7-8; *id.* at 11 (Tennessee law authorizing officers to use deadly force against any fleeing felon cannot be constitutionally applied absent probable cause "to believe that the suspect poses a threat of serious physical harm[] either to the officer or to others"); see also *Maryland* v. *Garrison*, 480 U.S. 79, 84 (1987) (examining not only the particularity of a search warrant, but also the "reasonableness of the manner in which it was executed"); *Schmerber* v. *California*, 384 U.S. 757, 770-771 (1966) (extraction of blood from suspect, based upon

probable cause and carried out under exigent circumstances, constitutional when "performed in a reasonable manner"); *Winston* v. *Lee*, 470 U.S. 753, 759-760 (1985).

There is no express requirement in the text of the Fourth Amendment that officers knock and announce their identity and purpose before entering a building to execute a valid search or arrest warrant. Whether the Fourth Amendment requires an announcement of identity and purpose before officers make such an entry is, therefore, a question of the reasonableness of the manner of execution of the warrant. See *Ker* v. *California*, 374 U.S. 23, 38 (1963) (plurality opinion) ("examining * * * arrest to determine whether * * * the method of entering the home may offend federal constitutional standards of reasonableness"). To determine when, if ever, the Constitution requires that officers knock and announce, this Court must balance the privacy and other interests served by that practice against the law enforcement interests that may justify an entry without prior announcement. In undertaking that analysis, it is important to consider the common law background of, and purposes served by, a knock and an announcement before entry.

The common law contained a "deeply rooted" principle that officers must announce their identity and purpose before entering a home. *Miller* v. *United States*, 357 U.S. 301, 313 (1958); *Sabbath* v. *United States*, 391 U.S. 585, 589 (1968). As stated in *Semayne's Case*, 77 Eng. Rep. 194, 195 (1603): "In all cases when the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K[ing]'s process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors."

The common law thus generally required that officers, before entering a person's dwelling, knock on the door and announce their identity and purpose. The common law also required that officers not enter a home forcibly until their request to enter had been actually or constructively refused. 2 W. LaFave, *Search and Seizure* § 4.8(c), at 277-279 (2d ed. 1987); *Miller*, 357 U.S. at 308, 310 n.10. Most States have enacted variants of the common law rule. See *Miller*, 357 U.S. at 308; G. Robert Blakey, *The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California*, 112 U. Pa. L. Rev. 499, 508-509 (1964) [hereinafter Blakey]. Congress has also embodied that rule in the federal knock-and-announce statute, enacted in 1917 and codified today at 18 U.S.C. 3109. That statute permits a federal officer to enter a home forcibly if, after giving "notice of his authority and purpose," he is "refused admittance."[4]

Requiring officers to announce their identity and purpose, and not to enter a home until refused admittance, furthers three distinct interests. The principal interest furthered is the reduction of the possibility that occupants will take violent defensive action based on the mistaken assumption that the entering party or parties are criminal intruders. Second, although the search or arrest warrant itself justifies a significant intrusion on

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[4] Section 3109 states: "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant." Although the statute refers only to search warrants, its criteria apply as well to the execution of arrest warrants. *Sabbath*, 391 U.S. at 588-589; *Miller*, 357 U.S. at 306; *Wong Sun* v. *United States*, 371 U.S. 471, 482-484 (1963).

the occupants' privacy interests, an announcement before entry tempers the invasion of privacy by reducing embarrassment or fright from a sudden entry. Third, a knock before entry prevents needless damage to the door of the home by giving occupants an opportunity to admit the officers peacefully. *Miller*, 357 U.S. at 307, 313; *Sabbath*, 391 U.S. at 589; LaFave, *supra*, § 4.8(a), at 272. In the rare case in which police have come to the wrong address, a knock before entry also enables occupants to correct that mistake before the police have entered. The role of pre-entry announcement in protecting those interests, and the longstanding endorsement of that practice including at the time that the Fourth Amendment was ratified, leave little doubt that it informs the meaning of the Fourth Amendment's requirement of "reasonableness." See *Payton* v. *New York*, 445 U.S. 573, 596-600 (1980); *Steagald* v. *United States*, 451 U.S. 204, 211-222 (1981). Thus, an officer's unannounced entry into a home may be unreasonable under the Fourth Amendment.

It has never been the law, however, that every entry must be preceded by an announcement.[5] An inflexible

[5] Notwithstanding its formulation in *Semayne's Case*, a case involving execution of a civil writ, the common law recognized exceptions to the announcement rule, as petitioner concedes. Pet. Br. 63. Announcement was not required when it would be a useless ceremony. See, *e.g.*, *Allen* v. *Martin*, 10 Wend. 300, 303 (N.Y. Sup. Ct. 1833) (reentry of home to recapture prisoner); *Howe* v. *Butterfield*, 58 Mass. (4 Cush.) 302, 305 (1849) (no one believed to be present to hear announcement); *Androscoggin R.R.* v. *Richards*, 41 Me. 233, 238 (1856) (no one present to hear announcement); *Hitchcock* v. *Holmes*, 43 Conn. 528, 531 (1876) (officer invited inside). Entry without announcement was also permitted when announcement could endanger the entering officer's life. See *Read* v. *Case*, 4 Conn. 166, 170 (1822) (where resident had pledged

requirement that officers announce their identity and purpose and then await a refusal of their request to enter would often injure vital law enforcement interests. A pre-entry announcement may imperil officers or other persons by giving persons inside time to arm themselves. It may also provoke and enable suspects to destroy the very evidence that is the subject of the search. Finally, it may facilitate escape. For those reasons, the federal courts have interpreted even the "unqualified" text, *Miller*, 357 U.S. at 309, of 18 U.S.C. 3109 to be subject to "exigent circumstances" exceptions. See *Sabbath*, 391 U.S. at 591 & n.8. These include where a pre-entry announcement could imperil officers or others, or enable suspects to destroy evidence or escape. See pages 17-29, *infra*. States with laws mandating police announcements have likewise found those laws subject to such exceptions. LaFave, *supra*, § 4.8(a) and (d)-(f), at 271,

to defend himself with a gun, to require officers to announce before entry would be a "palpable perversion" of the rule). And while the common law required announcement in misdemeanor cases, a dispute of authority existed whether it was required in felony cases. See Blakey, *supra*, 112 U. Pa. L. Rev. at 503, 544; 6 R. Burn, *Justice of the Peace* 365 (1845) ("[s]uch [a] request [to be given admittance] is undoubtedly necessary in all cases, where the warrant is for a *misdemeanour*"); *Commonwealth* v. *Reynolds*, 120 Mass. 190, 196 (1876) (announcement required in misdemeanor cases); compare 4 W. Blackstone, *Commentaries* 289 (1769) (when making warrantless arrest for felony, constable "is authorized (as upon a justice's warrant) to break open doors"; no reference to announcement requirement) with 3 W. Blackstone, *Commentaries* 412 (1768) (breaking of doors may be justified to execute civil writs "if the possession be not quietly delivered"). Compare *Payton*, 445 U.S. at 616 (White, J., dissenting) ("Even in cases of felony, the officers were required to announce their presence, demand admission, and be refused entry before they were entitled to break doors.").

280-287. As this Court has recognized, those statutory exceptions do not so much modify the common law rule as reflect a flexibility inherent in it. See *Sabbath*, 391 U.S. at 591 n.8; *Ker*, 374 U.S. at 39-40 (plurality opinion).

2. In light of that background, in the two cases in which this Court has evaluated claims that an unannounced entry violated the Fourth Amendment, the Court has recognized the need to balance the interests served by an announcement against the law enforcement interests at stake. In *Ker* v. *California*, *supra*, officers, without either knocking or announcing, unlocked the door to the home of suspect George Ker, entered, and made a warrantless arrest. The officers had followed Ker from the site of a drug transaction. A four-Justice plurality rejected Ker's claim that the unannounced entry violated the Fourth Amendment and that the narcotics evidence found in Ker's home incident to his arrest should be suppressed.[6] Justice Clark's opinion for the plurality assumed that the entry was a "breaking" within the meaning of the common law. 374 U.S. at 38. The plurality also assumed that, absent some justification for not doing so, the Fourth Amendment required that officers announce their identity and purpose before entering. But the unannounced entry of Ker's home was reasonable, the plurality stated, because

> justification for the officers' failure to give notice is uniquely present. In addition to the officers' belief that Ker was in possession of narcotics, which could be quickly and easily destroyed, Ker's furtive conduct in eluding them shortly before the arrest was ground for the belief that he might well have been expecting the police.

[6] Justice Harlan concurred in that result based on his view that the entry did not offend the "more flexible concept" of "'fundamental' fairness" under the Fourteenth Amendment. 374 U.S. at 44-46 (Harlan, J., concurring in the result).

Id. at 40; see also *id.* at 28 n.3 (noting officer's testimony that, in his experience, "on 'many, many occasions' * * * '[narcotics suspects] have flushed narcotics down toilets, pushed them down drains and sinks and [used] many other methods of getting rid of them prior to my entrance'").

In dissent, Justice Brennan, joined by three Justices, agreed that the Fourth Amendment permits officers to make an unannounced entry in designated circumstances:

> (1) where the persons within already know of the officers' authority and purpose, or (2) where the officers are justified in the belief that persons within are in imminent peril of bodily harm, or (3) where those within, made aware of the presence of someone outside (because, for example, there has been a knock at the door), are then engaged in activity which justifies the officers in the belief that an escape or the destruction of evidence is being attempted.

374 U.S. at 47 (Brennan, J., dissenting). But he took a narrower view of the scope of the "exception" for "when officers have reason to believe that someone within is attempting to destroy evidence." *Id.* at 61 (Brennan, J., dissenting). Justice Brennan disavowed reliance on testimony "that in [officers'] general experience narcotics suspects destroy evidence when forewarned of the officers' presence," for reliance on such a profile was an unacceptable substitute for determining "whether circumstances exist in the *particular* case which allow an unannounced police entry." *Id.* at 63 (Brennan, J.,

dissenting). See *Sabbath*, 391 U.S. at 591 n.8 ("[e]xceptions to any possible constitutional rule relating to announcement and entry have been recognized") (citing *Ker*, 374 U.S. at 47 (Brennan, J., dissenting)).

In *Dalia* v. *United States*, *supra*, this Court again addressed the validity of an unannounced police entry—this time, in the context of a covert entry into a suspect's office to install equipment needed to conduct court-authorized electronic surveillance. The Court held that the entry was a reasonable means to prevent suspects from learning of the surveillance. The Court rejected the claim that "the Fourth Amendment prohibits covert entry of private premises in all cases, irrespective of the reasonableness of the entry." 441 U.S. at 246. On the contrary, the Court stated, it was "well established" that officers "may break and enter to execute a search warrant" where doing so "is the only means by which the warrant effectively may be executed." *Id.* at 247 (citing, *inter alia*, *Ker*). Thus, "officers need not announce their purpose before conducting an otherwise [duly] authorized search if such an announcement would provoke the escape of the suspect or the destruction of critical evidence." *Id.* at 247-248 (quoting *Katz* v. *United States*, 389 U.S. 347, 355 n.16 (1967)).[7]

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[7] In *Dalia*, the Court also rejected a claim that the Fourth Amendment required officers to obtain court authorization to make a covert entry. Rather, "it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant—subject of course to the general Fourth Amendment protection 'against unreasonable searches and seizures.'" 441 U.S. at 257 (footnote omitted). Indeed, the Court stated that even when officers know at the time that they seek a search warrant that an unannounced or forced entry will be likely, they are not obliged to notify the issuing court or obtain advance approval of such entry. *Id.* at 257 n.19.

3. As *Ker* and *Dalia* suggest, while an entry may be constitutionally unreasonable if police do not knock and announce before entering, the government may be able to justify the entry by showing that law enforcement needs reasonably justified dispensing with a knock and announcement. Accordingly, when a defendant establishes that an entry was made without an announcement by the police followed by a reasonable delay to permit the occupant to admit the searching officers, the government must bear the burden of demonstrating a reasonable basis for its action. See *United States* v. *Mueller*, 902 F.2d 336, 344 (5th Cir. 1990); LaFave, *supra*, § 11.2(b), at 218-233; cf. *County of Riverside* v. *McLaughlin*, 500 U.S. 44, 57 (1991); *United States* v. *Matlock*, 415 U.S. 164, 177 n.14 (1974); *Medina* v. *California*, 112 S. Ct. 2572, 2580 (1992). The police may not meet that burden simply with a blanket assertion that an unannounced entry is justified, for example, in every case involving drugs or firearms. But the government's burden is satisfied by showing either by virtue of the specific facts known to the police or by their general experience that an announcement before entry could have jeopardized safety or the purpose of the particular entry.

Petitioner contends (Br. 52, 62-64) that this Court should give considerable, "if not decisive," weight to the common law formulation of the knock-and-announce rule. This Court, however, "has not simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage." *Payton*, 445 U.S. at 591 n.33. Rather, it has weighed the

interests at stake in light of contemporary conditions and practices. See *Garner*, 471 U.S. at 14; *Steagald*, 451 U.S. at 217 n.10.

Petitioner also argues (Br. 63) that for an unannounced entry to satisfy the Fourth Amendment, the government should be required to show "exigent circumstances," as it must to justify noncompliance under 18 U.S.C. 3109. As we demonstrate at pages 18-29, *infra*, the lower courts' application of the exigent circumstances exceptions to Section 3109 supplies a useful guide to determining whether an unannounced entry was reasonably justified under the Fourth Amendment. Moreover, in practice, the difference between standards of "exigent circumstances" and "reasonable justification" will often prove semantic. But as a doctrinal matter, the Fourth Amendment inquiry into reasonableness is distinct from Section 3109's announcement command, as numerous courts of appeals have recognized.[8] Where an exigent circumstances test has been required, it has been to justify exceptions from express constitutional or statutory requirements, such as the Fourth Amendment's warrant requirement, see *Warden* v. *Hayden*, 387 U.S. 294, 298-299 (1967), or Section 3109's textually "unqualified" announcement requirement, see *Miller*, 357 U.S. at 309. But the text of the Fourth Amendment does not mandate an

[8] See *Rodriguez* v. *Butler*, 536 F.2d 982, 988 (2d Cir.) (Section 3109 is more restrictive than the Fourth Amendment), cert. denied, 429 U.S. 943 (1976); *United States* v. *Sagaribay*, 982 F.2d 906, 909-910 (5th Cir.) (same), cert. denied, 114 S. Ct. 160 (1993); *United States* v. *Moore*, 956 F.2d 843, 847 (8th Cir. 1992) (same); *United States* v. *Nolan*, 718 F.2d 589, 602 (3d Cir. 1983); (same); but see *United States* v. *Kennedy*, 32 F.3d 876, 882 (4th Cir. 1994) (Fourth Amendment and Section 3109 are coextensive), cert. denied, No. 94-6500 (Jan. 23, 1995).

announcement rule; as we have noted, any such constitutional requirement derives instead from the Amendment's broader requirement of reasonableness. Petitioner's view would unjustifiably elevate a knock-and-announce rule to the status of a textual command, and in the process could strip officers in the occasional case of some of the flexibility implicit in the textual standard of reasonableness.[9]

B. The Officers In This Case Were Justified In Entering Petitioner's Home Simultaneously With Their Announcement

In executing the search warrant in this case, the Arkansas police identified themselves immediately upon entering petitioner's home. The record discloses two justifications for the officers' decision to enter without waiting until permission to enter had been refused. First, a reasonable basis existed for believing that an announcement before entry would place the officers in peril. Second, a reasonable basis existed for believing that such an announcement would provoke persons inside the home to destroy easily disposable narcotics evidence.[10]

[9] This case does not present the question of the scope of any exclusionary rule remedy for an unlawful entry to execute a valid warrant, and the Court has never addressed that issue under the Fourth Amendment. Compare *New York* v. *Harris*, 495 U.S. 14, 18-19 (1990), and *Segura* v. *United States*, 468 U.S. 796, 815 (1984) with *Miller*, *supra*, and *Sabbath*, *supra* (both involving warrantless entries to make an arrest, in violation of 18 U.S.C. 3109).

[10] Petitioner argues (Pet. Br. 64-65) that because the officers were not asked at the suppression hearing whether they in fact harbored those concerns, the entry cannot be justified by reference to them. As this Court has noted, however, "[w]hether a Fourth Amendment violation has occurred 'turns on an objective

1. As the courts of appeals have recognized in applying the exigent circumstances exception to 18 U.S.C. 3109, it is reasonable to forgo announcement (or to enter simultaneously with announcement) when a reasonable basis exists to believe that advance notice of an entry would place the officers or others in peril. See, *e.g.*, *United States* v. *Spinelli*, 848 F.2d 26, 30 (2d Cir. 1988) (unannounced entry); *United States* v. *Kane*, 637 F.2d 974, 978-980 (3d Cir. 1981) (unannounced entry); *United States* v. *Kennedy*, 32 F.3d 876, 882-883 (4th Cir. 1994) (entry immediately after announcement), cert. denied, No. 94-6500 (Jan. 23, 1995); *United States* v. *Nabors*, 901 F.2d 1351, 1354 (6th Cir.) (entry immediately after announcement), cert. denied, 498 U.S. 871 (1990); *United States* v. *Whitney*, 633 F.2d 902, 905, 908-911 (9th Cir. 1980) (entry "[w]ithin seconds" of announcement), cert. denied, 450 U.S. 1004 (1981); *United States* v. *Artieri*, 491 F.2d 440, 442, 444 (2d Cir.) (entry three seconds after announcement), cert. denied, 417 U.S. 949 and 419 U.S. 878 (1974); *United States* v. *Streeter*, 907 F.2d 781, 788-789 (8th Cir. 1990) (entry five to ten seconds after announcement); *United States* v. *Bonner*, 874 F.2d 822, 826 (D.C. Cir. 1989) (entry ten seconds after announcement); see also Restatement (Second) of Torts § 206, cmt. d, at 387 (1965); *Read* v. *Case*, 4 Conn. 166, 170 (1822) (recognizing a common law "peril to officers" exception).

In such a situation, pre-entry announcement, or delay following announcement, could actually increase the

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assessment of the officer's actions in light of the facts and circumstances confronting him at the time,' * * * and not on the officer's actual state of mind at the time the challenged action was taken." *Maryland* v. *Macon*, 472 U.S. 463, 470-471 (1985) (quoting *Scott* v. *United States*, 436 U.S. 128, 136 (1978)).

likelihood of violence. When the entering officers have a warrant to enter a home, the occupants' privacy interest is necessarily limited to the brief interval between the officers' announcement and their entry. That interest, while real, does not require police to refrain from practices reasonably tailored to ensuring their own safety. See *Terry* v. *Ohio*, 392 U.S. 1, 23 (1968) (stop and frisk of suspect for weapons based on reasonable suspicion justified by "immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him"); *Buie*, 494 U.S. at 333 (protective sweep of suspect's home based on reasonable suspicion justified by interest of police officer in assuring himself that the home "is not harboring other persons who are dangerous and who could unexpectedly launch an attack"); *Kane*, 637 F.2d at 978-979.[11]

An officer who prepares to enter a home of a suspected drug trafficker will often confront an unusually acute

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[11] In the federal system, federal agents virtually always announce their presence when executing a search warrant by demanding entry with language such as "FBI—we have a warrant to search your apartment—open the door." Even when officers do not believe that they can afford to delay the entry after announcing their authority and purpose, the announcement simultaneous with entry alerts the occupants to the presence of federal officials, and thereby reduces the risk that the agents will be mistaken for intruders. The FBI's policy in applying 18 U.S.C. 3109 states that "[w]here the Agent executing the warrant reasonably believes that by the announcement he/she will place himself/herself or other persons within [the] premises in imminent peril of bodily harm," entry may be accomplished without prior announcement. See *FBI Legal Handbook for Special Agents* §§ 5-2.2.2, 5-2.2.3(1) (1994); see also *id.* § 5-2.2.3(2)-(4) (recognizing other exceptions to Section 3109's announcement requirement).

risk of violence. There is a significant possibility that persons inside will be armed, sometimes with automatic or semi-automatic firearms such as machine pistols and assault rifles, and that the premises will have been fortified in anticipation of a police raid. See Kemal Mericli, *The Apprehension of Peril Exception to the Knock and Announce Rule—Part I*, 16 Search & Seizure L. Rep. 129, 129-130 (July 1989). Once an officer has announced his intention to enter a home to execute a search for contraband or to make an arrest, the drug trafficker has a heightened incentive to prevent the officer from attaining those goals. See Bureau of Justice Statistics, U.S. Dep't of Justice, *Drugs, Crime, and the Justice System: A National Report* 5 (Dec. 1992) ("To avoid being arrested and punished for trafficking, drug dealers commit violent crimes against police and threaten informants or witnesses."). Accordingly, "the law has uniformly recognized that substantial dealers in narcotics possess firearms" and that "entrance into a situs of drug trafficking activity carries all too real dangers to law enforcement officers." *Kennedy*, 32 F.3d at 882-883 (internal quotation marks omitted; citing cases); see *Bonner*, 874 F.2d at 824 (firearms are "tools of the [narcotics] trade," and "[o]nce police officers seeking to enter a drug traffickers' enclave have announced their identity and authority, they stand behind the door blind and vulnerable"); *United States* v. *Harris*, 435 F.2d 74, 81 (D.C. Cir. 1970) ("When the officers knocked on the door, they did not know whether they would be greeted in a normal manner or answered by a hail of bullets."), cert. denied, 402 U.S. 986 (1971); see also *United States* v. *Singer*, 943 F.2d 758, 762-763 (7th Cir. 1991); *State* v. *Stevens*, 511 N.W.2d 591, 596-597 (Wis. 1994), petition for cert. pending, No. 93-9026;

Commonwealth v. *Rodriguez*, 614 N.E.2d 649, 651 (Mass. 1993); *State* v. *Stalbert*, 783 P.2d 1005, 1007 (Or. Ct. App. 1989).

The issuance of a warrant to search the home or place of business of a suspected drug trafficker does not automatically meet the government's burden to show that an unannounced entry is reasonable. If, for example, officers know or have reason to know that the persons suspected of drug trafficking were not present within the building at the time of the entry and they have no other reason to believe that the persons inside presented a risk of danger, an unannounced entry based on a fear of peril would be unreasonable. It would also be unreasonable to make an unannounced entry on grounds of possible peril where the officers had reliable information (*i.e.*, from an informant) that the persons inside were unarmed. Compare *Sabbath*, 391 U.S. at 591 (exigency exception to Section 3109 inapplicable where "agents had no basis for assuming petitioner was armed or might resist arrest"). But otherwise, given the common possession of firearms by drug traffickers and the high risk of violence in apprehending them, law enforcement officers will generally be able to establish a reasonable basis for anticipating such danger in cases involving narcotics traffickers, and the Constitution does not prevent the officers from using the element of surprise to minimize that danger.[12]

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[12] It would not undercut the reasonableness of the officers' belief, however, to show that, unbeknownst to the officers in a particular case, the occupants of the dwelling were not in fact prepared to use violence. "It goes without saying that in determining the lawfulness of entry * * * we may concern ourselves only with what the officers had reason to believe *at the*

In this case, two specific facts known to the officers further justified a belief that the officers would face an increased risk of danger by delaying entry after an announcement. First, during the drug sale the previous day, petitioner had brandished a semi-automatic pistol and threatened to kill the informant if she proved to be cooperating with the police. Second, Jacobs, petitioner's confederate and housemate, had previously been convicted of crimes of violence: arson and firebombing. Those facts supplied an ample basis for believing that, given the opportunity to prepare to repel the officers with deadly force, petitioner and Jacobs might do so, and that an entry simultaneous with an announcement was therefore justified. Indeed, courts have often recognized those justifications in holding that officers were excused from complying with 18 U.S.C. 3109.[13]

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time of their entry." *Ker*, 374 U.S. at 40 n.12 (plurality opinion); cf. *Illinois* v. *Rodriguez*, 497 U.S. 177, 186 (1990).

[13] See *Singer*, 943 F.2d at 762-763 (unannounced entry valid where suspect, a drug trafficker, "was involved with guns and had made threats"); *Nabors*, 901 F.2d at 1354 (entry immediately after announcement valid where suspect was felon in possession of firearms and wore bulletproof vest); *Spinelli*, 848 F.2d at 29-30 (unannounced entry valid where suspect with reputation for violence was reasonably believed to be armed); *United States* v. *Pearson*, 746 F.2d 787, 792 (11th Cir. 1984) (entry simultaneous with announcement valid where defendant had prior convictions and was believed armed, and "agents knew they were walking into a dangerous situation that could quickly get out of control"); *Whitney*, 633 F.2d at 911 (entry within seconds of announcement valid where officers knew suspect had handgun, because "[t]he law does not require the officers to engage in a game of Russian roulette with a dangerous man"); *Kane*, 637 F.2d at 979-980 (unannounced entry valid where occupants known to possess weapons, apparently for purpose of protecting illegal drug business); *Artieri*, 491 F.2d at 444 (entry three seconds after

Petitioner contends (Pet. Br. 61-64) that because dangerous firearms have proliferated among criminals, the "risk of peril" rationale could allow an "exception" to "swallow[] the [knock-and-announce] rule." That contention is incorrect. As we have noted, even when searching for evidence of drug trafficking, if officers have reason to believe that a delay following announcement would pose no risk of danger, the officers would not be justified in dispensing with such a delay. Moreover, any "rule" based on the common law precept that an

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announcement valid where agents reasonably believed suspect "was likely to be armed"); *United States* v. *McShane*, 462 F.2d 5, 6 (9th Cir. 1972) (entry simultaneous with announcement valid where suspect was armed and had previously been convicted of firing weapon at police officer); cf. *United States* v. *Buckley*, 4 F.3d 552, 558 (7th Cir. 1993) (unannounced entry valid where suspect possessed guns and a pit bull), cert. denied, 114 S. Ct. 1084 (1994); *United States* v. *McConney*, 728 F.2d 1195, 1206 (9th Cir.) (en banc) ("When police have properly knocked and announced their identity and purpose, mild exigency is sufficient to justify simultaneous entry when entry can be accomplished without physical destruction of property."), cert. denied, 469 U.S. 824 (1984).

Some cases have taken a stricter approach. See *United States* v. *Marts*, 986 F.2d 1216, 1217-1218 (8th Cir. 1993) (entry less than five seconds after knocking and announcing violated Section 3109; "[t]he reasonable belief that firearms may have been within the residence," based on informant's having seen "numerous firearms" there during drug transactions, held "clearly insufficient"); *United States* v. *Mendonsa*, 989 F.2d 366, 370-371 (9th Cir. 1993) (entry three to five seconds after announcing violated Section 3109; neither fact that defendant was a drug dealer nor noises heard within house nor knowledge that defendant was on parole for armed robbery sufficient). In our view, those cases placed too great a burden on law enforcement officers to particularize the potential for violence before entering shortly after an announcement.

announcement should generally precede entry must be evaluated in light of the methods and means of contemporary criminal suspects. As this Court has observed: "Crime has changed, as have the means of law enforcement, and it would therefore be naive to assume that those actions a constable could take in an English or American village three centuries ago should necessarily govern what we, as a society, now regard as proper." *Steagald*, 451 U.S. at 217 n.10. The prevalence of firearms dictates that officers not always employ the same methods to protect themselves that were employed a century or more ago. See *Garner*, 471 U.S. at 14 (increased power of weaponry today dictates abandonment of blanket "fleeing felon" rule of common law); *Payton*, 445 U.S. at 591 n.33. That principle has generally been recognized under 18 U.S.C. 3109, see pages 18-19, *supra*, and it should be recognized in the Fourth Amendment context as well.

2. Apart from the threat to safety, the possibility that petitioner, Jacobs, or others would destroy narcotics in the house between announcement and entry justified entry simultaneous with announcement. Like the plurality in *Ker*, the courts of appeals, applying the exigent circumstances exception to 18 U.S.C. 3109, have consistently recognized that narcotics evidence is readily disposable, and that suspects, faced with an imminent police entry, tend to dispose of that evidence. In the vast majority of narcotics cases to present the issue, the courts have held that exigent circumstances justified full or substantial noncompliance with Section 3109. That has been so not only in the limited class of cases to which the *Ker* dissenters argued that the destruction-of-evidence "exception" should apply: where there is evidence unique to the case either that drugs

are likely to be destroyed on an announcement or that such drugs, after an announcement, are in fact being destroyed.[14] Instead, in numerous cases, the courts of appeals have allowed entry without an announcement,[15] or, as in this case, entry simultaneous with or seconds after an announcement,[16] even though no evidence of

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[14] See, *e.g.*, *Bonner*, 874 F.2d at 825-826 (sounds of possible destruction heard); *United States* v. *Allende*, 486 F.2d 1351, 1353 (9th Cir. 1973) (sounds of scampering feet heard), cert. denied, 416 U.S. 958 (1974).

[15] See, *e.g.*, *United States* v. *Arias*, 923 F.2d 1387, 1391 (9th Cir.) (unannounced entry based on dual concern that occupants "might be destroying evidence or arming themselves"), cert. denied, 502 U.S. 840, 876 (1991); *United States* v. *Tracy*, 835 F.2d 1267, 1270 (8th Cir.) (unannounced entry based on knowledge of similar drug sites where an announcement "would cause evidence to be destroyed before the officers could surmount the anticipated hindrances to their entry"), cert. denied, 486 U.S. 1014 (1988); *United States* v. *Garcia*, 741 F.2d 363, 366 (11th Cir. 1984) (announcement excused based on belief that suspect would be "able to wash the cocaine down the sink in the kitchen or bathroom"); *United States* v. *Tolliver*, 665 F.2d 1005, 1008 (11th Cir.) (unannounced entry where announcement "would have jeopardized the availability of evidence (the cocaine) which the agents knew to be inside"), cert. denied, 456 U.S. 935 (1982).

[16] See, *e.g.*, *Kennedy*, 32 F.3d at 882 (entry immediately after announcement based on belief that "the experienced drug distributors inside the house would attempt to destroy evidence unless the agents acted quickly"); *United States* v. *Markling*, 7 F.3d 1309, 1318 (7th Cir. 1993) (entry seven seconds after announcement where suspect was believed likely to flush cocaine down toilet); *United States* v. *Garcia*, 983 F.2d 1160, 1168 (1st Cir. 1993) (entry ten seconds after announcement where occupants were "believed to possess cocaine, a substance that is easily and quickly hidden or destroyed"); *United States* v. *Keene*, 915 F.2d 1164, 1168-1169 (8th Cir. 1990) (entry immediately after announcement based on fact that "persons who traffic in liquid narcotics often attempt to dispose of them, i.e., by pouring them

likely destruction existed apart from the assumption that the suspects in the home would conform to the tendency of narcotics suspects to destroy such incriminating contraband if they learn of an imminent entry.

The likelihood noted by the *Ker* plurality that a suspect will attempt hurriedly to dispose of narcotics evidence on learning that officers are about to enter his apartment or home is consistent with the experience of the police, as reflected in the numerous decisions (such as those cited above) that recount suspects flushing or pouring powdery, granular, leafy, and liquid narcotic substances down various indoor plumbing facilities (which did not exist at common law) as officers enter or prepare to enter. See *United States* v. *Carter*, 999 F.2d 182, 186 n.5 (7th Cir. 1993) ("it is a common practice for drug dealers to attempt to destroy the drug evidence when they are alerted to an imminent police search"). Indeed, during cross-examination at trial, petitioner herself admitted that, after the officers entered, she had flushed marijuana down the toilet, J.A. 68-70, and during the search, officers found a substance believed to be methamphetamine in the toilet, J.A. 53. In meeting the government's burden to justify an immediate entry, it is not necessary that police have case-specific proof that destruction of evidence is likely if entry is delayed, for it

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down a sink or floor drain"), cert. denied, 498 U.S. 1102 (1991); *Nabors*, 901 F.2d at 1354 (entry immediately after announcement based on belief that suspect had drugs "which could easily be disposed of"); *Nolan*, 718 F.2d at 598 (entry simultaneous with announcement based on belief that suspects would flush narcotics down toilet); *United States* v. *Jackson*, 585 F.2d 653, 662 (4th Cir. 1978) (entry simultaneous with announcement where suspects possessed gambling slips "susceptible of easy destruction").

is unrealistic to presume that such proof is available. Such a requirement, in fact, would often cost the police the very evidence that is the object of the search warrant. See Blakey, *supra*, 112 U. Pa. L. Rev. at 550.

Nevertheless, the existence of a warrant to search for and seize narcotics does not always supply a reasonable justification under the Fourth Amendment for officers to enter a home simultaneously with an announcement.[17] Here, as with the risk of peril to officers, a per se rule is not appropriate. In a particular case, the record may show that the officers had no reason to believe that narcotics evidence would likely be destroyed if advance notice were given of a police entry. For example, if the

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[17] The lower courts are divided on that issue. Applying the standard of reasonableness, seven state courts have held that the destruction-of-evidence justification applies whenever narcotics are reasonably believed to be present. See *Stevens*, 511 N.W.2d at 596 (Wisconsin); *State* v. *Knudson*, 499 N.W.2d 872, 876 (N.D. 1993) (citing *State* v. *Loucks*, 209 N.W.2d 772, 777-778 (N.D. 1973)); *State* v. *Eary*, 454 N.W.2d 685, 690 (Neb. 1990) (citing *State* v. *Meyer*, 311 N.W.2d 520, 524 (Neb. 1981)); *State* v. *Spisak*, 520 P.2d 561, 562-563 (Utah 1974); *People* v. *Lujan*, 484 P.2d 1238, 1241 (Colo. 1971); *People* v. *DeLago*, 213 N.E.2d 659, 661 (N.Y. 1965), cert. denied, 383 U.S. 963 (1966); *Henson* v. *State*, 204 A.2d 516, 519 (Md. 1964). Other courts have reached the same conclusion, provided the narcotics are believed to be packaged in quantities small enough to be quickly destroyed. See *Moore*, 956 F.2d at 850; *State* v. *Matos*, 605 A.2d 223, 224-225 (N.H. 1992); *Stalbert*, 783 P.2d at 1007. Other courts have reserved the question. *Hall* v. *Shipley*, 932 F.2d 1147, 1151 (6th Cir. 1991); *Rodriguez*, 536 F.2d at 987-988. But a number of state courts have rejected a "blanket" rule in narcotics cases. See *Moore*, 956 F.2d at 850 n.9 (citing cases); *Illinois* v. *Condon*, 113 S. Ct. 1359, 1360 (1993) (White, J., dissenting from denial of certiorari) (noting conflict); see Charles Garcia, Note, *The Knock and Announce Rule: A New Approach to the Destruction-of-Evidence Exception*, 93 Colum. L. Rev. 685 (1993).

officers knew that the only person at home at the time of the search is unconnected with the narcotics enterprise, that the premises contain no plumbing facilities, or that the narcotics are packaged (*i.e.*, in crates) so as to render them nondisposable within a brief period of time, then invocation of a destruction-of-evidence justification for an unannounced entry would be unreasonable.

Where, however, either the facts of the case or the officers' general experience suggests that an entry to execute a valid search warrant for narcotics could be frustrated by requiring officers to announce their identity and purpose at the time of entry and to wait outside the premises either for refusal of permission to enter or for any designated period of seconds, the officers may dispense with a delay of entry.[18] See *Ker*, 374 U.S. at 39-40 (plurality opinion) (at common law, compliance not required where it would frustrate purpose of making an arrest). The entry in this case conformed to that approach. The police announcement itself vindicated a principal goal of the premise that officers should identify themselves before entering: By notifying occupants that the entering parties are the police, the announcement minimized the possibility that occupants might mistake the entering parties as lawless intruders and use violent means to defend their homes. At the same time, the immediate entry eliminated the period of delay between

[18] Even when officers do delay entry, they may, of course, force entry when there has been an actual or a constructive refusal of admittance. If the officers are not admitted after the lapse of a reasonable period of time in which to open a door, officers may conclude that they have been refused entry. See LaFave, *supra*, § 4.8(c), at 278. As discussed in the text, the delay, although not the announcement of police purpose and authority, may be dispensed with when police reasonably believe it would permit destruction of evidence.

announcement and entry, in which destruction of evidence is likely to occur.[19] The Fourth Amendment did not compel the frustration of the purpose of the search while waiting for the occupants to permit entry.

CONCLUSION

The judgment of the Arkansas Supreme Court should be affirmed.

Respectfully submitted.

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[19] Petitioner argues that, because the judge who issued the warrant did not indicate that "the objects to be seized [we]re in danger of imminent removal" (Br. 65), destruction of evidence was not likely to occur. See *ibid.* ("[I]f destruction of evidence were a risk, why would the judge grant three days in which to search?"). The risk of destruction, however, did not exist independent of the search, but would have been triggered by the officers' announcement of their imminent entry. Moreover, there is no constitutional requirement that an entry without prior notice to the occupant be specified in the warrant. See *Dalia*, 441 U.S. at 257.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SHARLENE WILSON,

Petitioner,

—v.—

STATE OF ARKANSAS,

Respondent.

ON WRIT OF *CERTIORARI*
TO THE ARKANSAS SUPREME COURT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF ARKANSAS, AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Bill of Rights. The ACLU of Arkansas is one of it statewide affiliates. Since its founding in 1920, the ACLU has frequently appeared before this Court, both as direct counsel and as *amicus curiae*. In particular, the ACLU has participated in many cases involving the Fourth Amendment. Because this case addresses an important Fourth Amendment question, its proper resolution is a matter of significant concern to the ACLU and its members.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary association of criminal defense lawyers founded in 1958 with its office in Washington, D.C. The American Bar Association recognizes NACDL as an affiliate organization, and NACDL has full representation on the ABA House of Delegates. Among its purposes and missions stated in its bylaws are "to promote the proper administration of justice," "to ensure justice and due process for persons accused of crime," and to promote "continued recognition and adherence to the Bill of Rights [which is] necessary to sustain the quality of the American system of justice."

NACDL has over 8,100 lawyer members in all 50 states and the District of Columbia, Puerto Rico, Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, Canada, and Australia. NACDL has 65 state and local affiliates from Hawaii to Florida and even in Canada and approximately 31,000 affiliate lawyer members.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

STATEMENT OF THE CASE

On December 31, 1992, Arkansas law enforcement officers executed a search warrant to look for illegal narcotics and a small caliber handgun at the home of the petitioner, Sharlene Wilson. According to the testimony at the suppression hearing, when the police arrived at petitioner's home, petitioner, her son, petitioner's soon-to-be husband, and two friends were inside the house. *See* J.A. 62-63. Officer Henry Efird, who had obtained the search warrant, admitted that he heard no officer announce their presence, knock on the door of petitioner's home, or state their purpose for being there. J.A. 40.

Officer Roger Walls testified that he "was either [the] first or second" officer who entered petitioner's home. J.A. 40. Officer Walls stated that when the search team arrived at petitioner's home it "was late evening," although he could not recall the exact time or whether it was already dark. J.A. 41. Officer Walls testified that the "prime door" was open, but a screen door was shut. Officer Walls testified that he and another officer "identified ourselves as police officers and told them [the occupants of petitioner's home] we had a search warrant and entered while we were doing that." J.A. 41.

No testimony indicated that petitioner or anyone inside was given an opportunity to admit the police into petitioner's home. Moreover, no testimony revealed that the police had any reason to believe when they approached petitioner's home either that petitioner or anyone else in the home might destroy evidence, or that the occupants of the home represented a threat to the safety of the officers.

The search of the home disclosed, *inter alia*, evidence of drug possession and a small caliber handgun. J.A. 53. The trial court denied petitioner's motion to suppress the evidence due to the failure of the officers to announce their

presence and purpose before entering petitioner's home. J.A. 45. On appeal, the Arkansas Supreme Court concluded that "[t]he testimony indicated that the officers entered the home while they were identifying themselves." J.A. 77. There is no indication from that court that exigent circumstances justified an immediate police entrance into petitioner's home. The court ruled that the officers had followed Rule 13.3(e) of the Arkansas Rules of Criminal Procedure, which does not require that officers announce their presence and purpose in the execution of a search warrant.[2]

On appeal, the Arkansas Supreme Court dismissed petitioner's claim that the Constitution requires officers to announce their presence and purpose before forcibly entering a home. The court ruled: "There is no authority for Ms. Wilson's theory that the knock and announce principle is required by the Fourth Amendment." J.A. 77.

In this Court, petitioner argues that the Fourth Amendment requires police officers to announce their presence and purpose before they forcibly enter a private home.

SUMMARY OF ARGUMENT

When assessing the reasonableness of a challenged police practice, this Court often considers common law principles. Under the common law, a governmental officer was required to announce his authority and purpose before breaking open the doors of a home. The origins of the an-

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[2] Ark.R.Crim.P. 13.3(e), in pertinent part, provides:

> The executing officer, and other officers accompanying and assisting him, may use such degree of force, short of deadly force, against persons, or to effect entry or to open containers as is reasonably necessary for the successful execution of the search warrant with all practicable safety . . . .

nouncement rule have been traced back to *dicta* from the seventeenth century. *Semanye's Case*, 77 Eng.Rep. 194, 195 (K.B. 1603). That *dicta*, however, subsequently received the approval of many British and American legal authorities. Today, the announcement requirement stands as a fundamental right that is an essential component of the privacy surrounding the home.

In concluding that the announcement requirement is not compelled by the Fourth Amendment, the court below ignored this Court's many rulings which have rejected the position that the Constitution has nothing to say about how police officers execute an intrusion of a home. While there was no definitive opinion in *Ker v. California*, 374 U.S. 23 (1963), eight Justices agreed that police entries into a home must withstand scrutiny under the Reasonableness Clause of the Fourth Amendment. No Justice in *Ker* supported the notion that officers are free from constitutional restraints to force open doors whenever they possess a warrant or probable cause to enter. Rulings since *Ker* establish that police do not have unchecked discretion to decide how to enter or invade a home.

Furthermore, under the Reasonableness Clause of the Fourth Amendment, the Court has evaluated the manner in which a search and seizure is executed. Prior precedents, including *Maryland v. Garrison*, 480 U.S. 79 (1987); *Tennessee v. Garner*, 471 U.S. 1 (1985); and *Chimel v. California*, 395 U.S. 752 (1969), establish that the manner in which a particular intrusion is carried out -- even one authorized by a warrant or valid exception to the warrant rule -- must satisfy the reasonableness test of the Fourth Amendment. No ruling of this Court supports the broad discretionary powers sanctioned by the court below. Indeed, in *Camara v. Municipal Court*, 387 U.S. 523, 532 (1967) -- which involved an entry *substantially less* intrusive than the entry of petitioner's home -- this Court recognized that a

homeowner has constitutional interests in being notified of an official's presence and the lawful limits of that official's authority to enter and search.

Finally, the announcement rule advances compelling privacy and security interests of a homeowner. Those who criticize the rule take a position that is not consistent with the reasoning of this Court's cases. Likewise, those who malign the announcement rule are wrong when they declare this safeguard only benefits the guilty. This Court and the United States Congress, among others, have rejected this judgment. The notification requirement is a protection the Fourth Amendment affords to *all* persons.

ARGUMENT

I. UNDER THE COMMON LAW, A GOVERNMENTAL OFFICER WAS REQUIRED TO REQUEST ADMITTANCE AND BE REFUSED ENTRY BEFORE FORCING OPEN THE DOORS OF A HOME

In resolving Fourth Amendment questions, the Court often considers common law principles when evaluating the reasonableness of a challenged police practice. Members of the Court have been reluctant to invalidate searches and seizures approved by the common law and followed in American jurisdictions when the Fourth Amendment was ratified.[3] But fidelity to the common law cuts both ways. If the imprimatur of the common law is an important factor when the Court sanctions certain governmental intrusions,

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[3] *See, e.g., California v. Hodari D.*, 499 U.S. 621, 624-25 (1991); *Tennessee v. Garner*, 471 U.S. at 26 (O'Connor, J., dissenting); *United States v. Watson*, 423 U.S. 411, 418-21 (1976).

see United States v. Watson, 423 U.S. at 428-29 (Powell, J., concurring),[4] then the Court owes equal respect to common law rules that proscribed governmental intrusions that violated the privacy and security of the individual.

After all, if one of the purposes of the Fourth Amendment is to "preserve that degree of respect for the privacy of persons and the inviolability of their property that existed" in 1791, *Minnesota v. Dickerson*, 508 U.S. __, 113 S.Ct. 2130, 2139 (1993)(Scalia, J., concurring), then the Court must be evenhanded in its reliance on the common law when determining what is reasonable under the Fourth Amendment. The Court should reject arguments that eliminate or narrow a constitutional freedom that was protected when the Fourth Amendment was proposed and "has been generally adhered to by the traditions of our society ever since." *County of Riverside v. McLaughlin*, 500 U.S. 44, 66 (1991)(Scalia, J., dissenting). The right to be free from an unannounced, forcible entry into one's home undoubtedly is such a freedom.

The seeds for what is known as the knock and announce rule were first planted in the seventeenth century. In *dicta*, the court in *Semanye's Case* stated:

> In all cases when the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the King's process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and make request to open doors.[5]

In a 1757 criminal case, the announcement rule was again addressed by the English judiciary. In the *Case of Richard Curtis*, the court restated the formula articulated in *Semanye's Case* and unanimously ruled that peace officers executing an arrest warrant for a breach of the peace "may break open doors, after having demanded admittance and given due notice of their warrant."[6]

The requirement that an officer announce his presence and purpose before breaking open doors also received the approbation of respected English legal commentators. Regarding arrest warrants, Hale wrote: "If it be a warrant for felony, or a warrant for the surety of the peace, the officer may break open the door, if he be sure the offender is there, if after acquainting them of the business, and demanding the prisoner, he refuses to open the door."[7] Hawkins also recognized the requirement of announcement as a precondition

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[4] In *Watson*, Justice Powell noted that logic "would seem to dictate that arrests be subject to the warrant requirement at least to the same extent as searches." *Id.* at 429. In the end, however, Justice Powell concluded that "logic sometimes must defer to history and experience." *Id.*

[5] 77 Eng.Rep. at 195. *Semanye's Case* involved a sheriff's execution of a civil writ of attachment.

[6] 168 Eng.Rep. 67, 68 (K.B. 1757).

[7] 1 Sir Matthew Hale, PLEAS OF THE CROWN 582 (1736); *see also* 2 Hale, PLEAS OF THE CROWN 90 (1736)("[A constable] may break open doors to take the felon, if the felon be in the house, and his entry denied after demand and notice that he is constable"); *id.* at 102 ("If the person pursued by *hue* and *cry* be in a house, and the doors are shut, and refused to be opened, upon demand of the constable, and notification of his business, he may break open the doors"); *id.* at 103 (Upon the hue and cry, officers may search suspected houses for felons, "but it must be always remembered, that in case of breaking open a door, there must be first a notice given to them within of his business, and a demand of entrance, and a refusal before doors can be broken"). Hale's scholarship was considered "the settled doctrine[] of the common law." *Chipman v. Bates*, 15 Vt. 51, 60 (1843); *see also* Nelson B. Lasson, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 35 (1937).

to a forcible entry. Officers could break open doors to effectuate an arrest, but Hawkins stated "that the law doth never allow of such Extremities but in Cases of Necessity; and therefore, That no one can justify the breaking open another's Doors to make an Arrest, unless he first signify to those in the House the Cause of his coming, and request them to give him Admittance."[8]

The requirement of notification and purpose also applied to search warrants. According to Hale, "[i]f the door be shut, and upon demand it be refused to be opened by them within, if the stolen goods be in the house, the officer may break open the door."[9]

The knock and announce rule declared in *Semanye's Case* "was widely followed in early American decisions."[10]

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[8] 2 William Hawkins, PLEAS OF THE CROWN 86 (ch. XIV)(1777); *see also* William Sheppard, THE OFFICERS OF CONSTABLES, ch.8, §2, no. 4 (1650), quoted in Telford Taylor, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 28-29 (1969)("For it is the chief part of their office to represse fellony, and albeit it be a man's house he doth dwell in, which they doe suspect the fellon to be in, yet they may enter in there to search; and if the owner of the house, upon request, will not open his dores, it seems the officer may break open the dores upon him to come in to search").

[9] 2 Hale, PLEAS OF THE CROWN at 150-51. *See also* Michael Dalton, COUNTREY JUSTICE 187 (1619)(An "officer, before he break open the house or doores of any person, he must first signify the cause of his comming, & desire that the doores may be opened unto him").

[10] G. Robert Blakey, "The Rule of Announcement and Unlawful Entry: *Miller v. United States* and *Ker v. California*," 112 U.Pa.L.Rev. 499, 504 (1964)(citing cases). *See also* Horace L. Wilgus, "Arrest Without a Warrant," 22 Mich.L.Rev. 798, 802-03 (1924)("Before doors are broken, there must be a necessity for so doing, and notice of the authority and purpose to make the arrest must be given and a demand and refusal of admission must be made, unless this is already understood, or the peril would be increased")(footnotes omitted).

Moreover, the fundamental nature of the right to notification before forcible entry is demonstrated by the laws found in many of the States that ratified the Fourth Amendment. As one historian has noted, "[t]he statutes and legal manuals of at least seven states permitted forcible entry only after a householder had refused to admit a searcher under circumstances that included smuggling, counterfeiting, and trading with the enemy."[11] For example, in 1777 Massachusetts sanctioned forcible entry and search of a home where an officer "after *demanding* of the Owner of such House . . . and if the owner of the same, or the person in his absence found therein shall not open the same immediately."[12] A 1782 Massachusetts law governing the issuance of search warrants to discover contraband permitted forcible entry "if Admittance be *refused* or cannot be obtained."[13]

On April 13, 1782, New York passed a law that allowed constables possessing search warrants "to break open the doors of any house or outhouse, for the purpose of making any [contraband] search, if *admittance* shall be refused."[14] Similarly both New Jersey and Pennsylvania permitted officers to undertake forcible entries where a homeowner had opposed or refused a previous demand for admit-

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[11] William Cuddihy, The Fourth Amendment: Origins and original meaning, 602-1791, at 1512 (1990)(unpublished Ph.D. dissertation, Claremont Graduate School)(footnote omitted)(citing statutes of Massachusetts; Connecticut; New York; New Jersey; South Carolina; and Georgia).

[12] Mass. Resolve 1776-77, ch. 1176 (May 7, 1777)(emphasis added).

[13] Mass. Acts And Laws, 1782-83, at 86-87 (emphasis added).

[14] N.Y. St. sess. 5, ch. 39, §3 (April 13, 1782), N.Y. State Laws, vol.1 (1777-84), p.480 (emphasis added).

tance.[15] Under Connecticut law, state collectors could "enter any Store or Place for the execution of his said Office, as shall be needful, after making *Demand* at the Door of Entrance, and refusal or neglect to grant the same, in the Day Time."[16] Finally, on March 3, 1791, Congress enacted a provision concerning the importation of distilled spirits that provided: "That it shall be lawful for the officers of inspection of each survey at all times in the daytime, *upon request*, to enter into all and every the houses, store-house, ware-houses, buildings and places which shall have been entered in manner aforesaid, and by tasting, gauging or otherwise, to take account of the quantity, kinds and proofs of the said spirits therein contained." U.S. Stat., 1st Cong., Sess. III, ch. 15, §29 (March 3, 1791)(emphasis added).

The announcement rule was also recognized in the legal manuals read by early American jurists and lawyers. CONDUCTOR GENERALIS (June 15, 1801), a popular treatise among American justices of the peace, citing Hawkins, explained that notification of purpose was necessary to break open doors to apprehend a felon.[17] Announcement was

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[15] *See* N.J. St., 6th Gen. Assemb., 2d Sitting, ch. XXXII, §18 (June 24, 1782)(search warrants may be granted officers "and in case of Refusal to permit such Search, or if Opposition be made thereto, [officers may] break open Doors and Locks for the Purpose aforesaid"); Pa.Stats. ch. CXC, §10 (1780)("And in case of refusal or opposition, [naval officers possessing a writ of assistance] . . . shall break open doors, and remove obstacles, and do and perform every and all other things, which by this Act he is authorized to do").

[16] "An Act for laying an Excise on sundry Articles of Consumption within this State," Ct.St., 1783, Jan. sess., Acts and Laws, 1783, Jan sess., 622 (emphasis added).

[17] In the chapter entitled "Arrest," CONDUCTOR explained: "As to the case, of breaking open doors, in order to apprehend offenders, it is to be observed, that the law doth never allow of such extremities but in cases (continued...)

similarly required to execute search warrants in a forcible manner.[18] Other legal manuals of this era reaffirmed the need for announcement in the execution of arrest and search warrants.[19]

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[17] (...continued)
of necessity; and therefore, that no one can justify the breaking open of another's door to make an arrest, unless he first signify to those in the house the cause of his coming, and them to give him admittance."

[18] In the chapter entitled "Search Warrants," CONDUCTOR explained: "Whether the stolen goods are in the suspected house or not, the officer and his assistants in the day time may enter, the doors being open, to make search, and it is justifiable by this warrant. If the door be shut, and upon demand it be refused to be opened, by them within, if the stolen goods be in the house, the officer may break open the door."

In the chapter entitled "Surety For The Peace," CONDUCTOR explained how a peace warrant shall be executed: "It seems generally agreed, that where a person authorised by warrant of a justice of the peace, to compel a man who is sheltered in an house, to find sureties for the peace or good behavior, is denied quietly to enter into it, he may justify breaking open the doors in order to take him; but he must first signify to those in the house the cause of his coming, and request them to give him admittance."

[19] *See* 1 Richard Burn, THE JUSTICE OF THE PEACE AND PARISH OFFICER 98 (*circa* 1770)(repeating Hawkins' statement that forcible entry only permitted after officer "first signify to those in the house the cause of his coming, and request them to give him admittance"); 1 Joseph Chitty, THE CRIMINAL LAW (1836), ch. II, at 52-53 ("But when *it is certain* that a treason or felony has been committed, or a dangerous wound given, and the offender being pursued, take refuge in his own house, either a constable or private individual, without distinction, may without any warrant break open his doors after proper demand of admittance"); *id.* at 65-66 ("With respect to the mode of executing [a search] warrant, if the door be shut, and upon demand, not opened, it may be broken open, and so may boxes, after the keys have been demanded, and though the goods be not found, the officer will be excused").

These statutes and the legal manuals consulted by early American justices of the peace -- the same judges responsible for issuing the bulk of the search and arrest warrants during this era -- provide convincing evidence that announcement was a precondition if an officer sought to break open the doors of a home. The absence of cases declaring "illegal an arrest on the grounds of inadequate notice"[20] does not undermine the fundamental status of the announcement rule under the common law. In most of the American cases, courts were not required to address the notice rule because officers typically announced their purpose and entry was denied.[21] As Justice White has already recognized, the common law imposed "carefully crafted restrictions" on officers forcibly entering a home, one of which was that "officers were required to announce their presence, demand admission, and be refused entry before they were entitled to break doors."[22]

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[20] Blakey, *supra* note 10 at 506.

[21] *See, e.g., State v. Shaw*, 1 Root 134 (Conn. 1789)(warrant for treason); *Kelsy v. Wright*, 1 Root 83 (Conn. 1783)(warrant for lewd conduct); *Bell v. Clapp*, 10 Johns. R. 263 (N.Y.Sup.Ct. 1813)(affirming the right of the officer, who gave proper notice, to conduct forcible entry to execute search warrant). As one commentator has noted, even the dreaded writs of assistance permitted forcible search only where customs officers faced resistance to their authority. *See* Note, "Announcement in Police Entries," 80 Yale L.Rev. 139, 144-45 (1970).

[22] *Payton v. New York*, 445 U.S. 573, 616 (1980)(White, J., dissenting)(footnote omitted). Even Professor Blakey, who is critical of some of the broad language in the Court's earlier cases, does not contest the common law origins of the announcement rule, *see* Blakey, *supra* note 10 at 545, n.337 & 554.

II. THE COURT'S PRIOR RULINGS REJECT THE VIEW THAT OFFICERS ARE FREE FROM CONSTITUTIONAL STANDARDS TO DECIDE HOW THEY WILL EXECUTE AN INTRUSION INTO A HOME

While the above discussion demonstrates that the common law required an officer to announce his presence and purpose before forcibly entering a home, this Court has not blindly followed common law traditions when resolving Fourth Amendment issues. *Garner*, 471 U.S. at 6; *Steagald v. United States*, 451 U.S. 204, 217 (1981); *Payton v. New York*, 445 U.S. 573, 591, n.33 (1980). But the ruling below is not only unsupported by common law principles, it also conflicts with this Court's precedents. Prior rulings have rejected the view sanctioned by the court below that the Constitution has nothing to say about how police officers execute a search of a home.

A. *Ker* Establishes That Forcible Police Entries Into A Home Are Governed By The Reasonableness Clause Of The Fourth Amendment

Although there was no authoritative opinion for the Court in *Ker v. California*, 374 U.S. 23, Justice Clark's plurality opinion does not support the position that officers are free to make an unannounced, forcible entry whenever they possess probable cause for a search. Justice Clark upheld the unannounced entry in *Ker* due to the exigent circumstances of the case.[23] The *Ker* plurality, furthermore, did

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[23] 374 U.S. at 40 ("Here justification for the officers' failure to give notice is uniquely present. In addition to the officers' belief that Ker was in possession of narcotics, which could be quickly and easily destroyed, Ker's furtive conduct in eluding them shortly before the arrest was ground for the belief that he might well have been expecting the police")(footnote omitted).

not question the constitutional status of the announcement requirement. And the four other Justices who comprised Justice Brennan's dissenting opinion were emphatic that the notice rule was firmly rooted in the protection provided by the Fourth Amendment.[24]

Most importantly, the *Ker* plurality did not suggest that officers are free from constitutional restraints to force open the doors of a home whenever they possess a warrant or probable cause to enter. On the contrary, the *Ker* plurality concluded that the particular entry at issue satisfied the standards of the Fourth Amendment's Reasonableness Clause.[25]

B. Prior Rulings Establish That Police Do Not Have Unchecked Discretion To Decide How To Enter Or Invade A Home

The privacy and security of the home has received the most scrupulous protection under this Court's rulings. A long line of cases have rejected claims that officers possess

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[24] 374 U.S. at 47-59 (opinion of Justice Brennan). Even critics of a broad knock and announce rule concede that after *Ker*, the announcement rule is required by the Fourth Amendment. *See, e.g.*, Michael R. Sonnenreich & Stanley Ebner, "No-Knock and Nonsense, An Alleged Constitutional Problem," 44 St. John's L.Rev. 626, 643 (1970) (In *Ker* "there was virtual unanimity on one point: the rule of announcement is a constitutional requirement implicit in the fourth amendment proscription against unreasonable searches and seizures"); Blakey, *supra* note 10 at 551 (*Ker* "indicates that the rule of announcement is of constitutional dimension"). *Accord*, Charles Patrick Garcia, Note, "The Knock and Announce Rule: A New Approach to the Destruction-of-Evidence Exception," 93 Colum.L.Rev. 685, 693-94 (1993).

[25] "We therefore hold that in the particular circumstances of this case the officers' method of entry, sanctioned by the law of California, was not unreasonable under the standards of the Fourth Amendment as applied to the States through the Fourteenth Amendment." 374 U.S. at 40-41.

discretionary authority to enter or invade a home, provided they have secured a judicial warrant, or believe an exception to the warrant rule exists to justify an intrusion. Most recently, in *Maryland v. Buie*, 494 U.S. 325 (1990), the Court turned aside an argument that the police should be granted discretion to undertake a protective sweep of a home incident to the arrest of an individual named in an arrest warrant for a violent crime. Rather than granting officers the discretion to conduct a protective sweep, the Court held that such intrusions are constitutional only when there is "a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Id.* at 337.

Similarly, in *Arizona v. Mincey*, 437 U.S. 385 (1978), a unanimous Court ruled that police officers must obtain judicial approval before entering a home to investigate a serious offense, even where there is powerful proof that evidence of a crime will be found inside. The fact that the police in *Mincey* were investigating a recent homicide did not alter the constitutional protection afforded the home. Like the situation at hand when the police are looking for narcotics in a private residence, the "seriousness of the offense under investigation" neither diminishes the privacy that surrounds the home, nor justifies relaxing the constitutional constraints imposed on officers who invade an individual's home. *Id.* at 394. *See also Thompson v. Louisiana*, 469 U.S. 17 (1984)(*per curiam*).

The importance of checking police discretion when entering a home was again emphasized in *Payton v. New York*, 445 U.S. 573. There officers had unquestioned probable cause to arrest, and sought to effectuate those arrests inside of the homes of the defendants. This Court ruled that, absent exigent circumstances, the Fourth Amendment required that a judicial warrant be obtained before police breach the entrance of an individual's home. 445 U.S. at 589. The

reasoning of *Payton* was reaffirmed in *Welsh v. Wisconsin*, 466 U.S. 740 (1984). In *Welsh*, the defendant's car was found abandoned on the side of a road, and an officer had probable cause to believe that Welsh had recently retreated to his house. The *Welsh* Court also *assumed* that without an immediate entry of the defendant's home the police would be unable to preserve the evidence of the defendant's blood-alcohol level. *Id.* at 754. Despite this exigency, the Court concluded that the warrantless, night entry was unconstitutional where the police sought only to arrest for a nonjailable traffic offense. *Id.*

These cases illustrate an important principle that was not grasped by the decision below. That is, when the privacy of one's home is at stake, the obtaining of a judicial warrant, or the existence of exigent circumstances to intrude, does not exhaust constitutional scrutiny of the actions taken by the police when executing their authority to search and seize.[26] A police entry into a home -- even an entry authorized by a judicial warrant or a recognized exception -- must still pass constitutional muster under the Fourth Amendment's Reasonableness Clause. Heretofore, absent

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[26] *Cf. Arizona v. Hicks*, 480 U.S. 321 (1987)(lawful police entry into a home due to exigency does not authorize search of an object that lacks probable cause to be associated with criminal conduct). Although it did not involve an intrusion of a home, the reasoning of *Ybarra v. Illinois*, 444 U.S. 85 (1979), also demonstrates the Court's teachings that the possession of a search warrant does not release police officers from constitutional restraints when they seek to execute that warrant. In *Ybarra*, the police had a warrant to search a tavern and bartender. Once inside, the police frisked patrons of the bar. This Court ruled that the search warrant provided no authority to frisk the tavern's patrons. Those searches were permissible only if the police had individualized, reasonable suspicion that the persons searched were armed and presently dangerous. *Id.* at 91-94.

exigent circumstances, routine intrusions into the home have withstood constitutional scrutiny where the police identify themselves and announce their purpose. The decision below is remarkable in that it offers no reasons for abandoning a constitutional safeguard that has been approved by Congress,[27] recognized by many lower federal and state courts,[28] codified in the statutes of thirty-one states and the District of Columbia,[29] and described by this Court as a right that is "deeply rooted in our heritage" and "embedded in Anglo-American law." *Miller v. United States*, 357 U.S. 301, 313 (1958). Indeed, the respect and legal standing of the announcement rule is recognized by the State of Arkansas itself. Arkansas law enforcement officers must give notice of their office and purpose as a prerequisite to a forcible entry into a home to make an arrest.[30]

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[27] 18 U.S.C. §3109 controls the authority of federal officers to execute a search warrant. It provides:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

[28] *See* list of rulings in Appendix A.

[29] *See* list of statutes in Appendix B.

[30] *See* Ark. Code Ann. §16-81-107 (c). This provision states: "To make an arrest, an officer may break open the door of a house in which the defendant may be, after having demanded admittance and explained the purpose for which admittance is desired."

III. UNDER THE FOURTH AMENDMENT'S REASONABLENESS CLAUSE, THIS COURT HAS EVALUATED THE MANNER OR METHOD OF HOW A SEARCH AND SEIZURE IS EXECUTED

As noted above, this Court's holdings make clear that the existence of a judicial warrant or a recognized exception to the warrant requirement does not grant officers unchecked discretion to decide how to execute a search or seizure within a home. The concept of reasonableness, which is at the core of the Fourth Amendment's text, mandates that the Court also evaluate the manner in which a search or seizure is conducted. This maxim of Fourth Amendment doctrine is applicable even where the police believe that their conduct is justified to secure the arrest of a wanted suspect, or necessary to prevent the destruction or removal of evidence of crime.

Tennessee v. Garner, 471 U.S. 1, is just one of several cases to reiterate this principle. In *Garner*, having probable cause to make an arrest, a police officer utilized deadly force to prevent the immediate escape of a burglary suspect. State officials argued that if probable cause exists to make an arrest, the Fourth Amendment has nothing to say about *how* that arrest is executed. *Id.* at 7. This Court rejected that argument and explained that the Fourth Amendment's requirement of reasonable seizures "depends on not only when a seizure is made, but also how it is carried out." *Id.* at 8. Consistent with this principle, probable cause to arrest does not authorize an officer to use deadly force unless a suspect "poses a threat of serious physical harm, either to the officer or to others." *Id.* at 11.

Similarly, in *Maryland v. Garrison*, 480 U.S. 79, police obtained a warrant that was supported by probable cause to search the person and apartment of Lawrence McWebb.

When the police applied for the warrant and arrived at the building to execute the warrant, they believed that there was only one apartment on the premises described in the warrant. In fact, the described premises contained two apartments, one occupied by McWebb and one by Garrison. Incriminating evidence was discovered in Garrison's apartment before the police realized that a mistake had been made. *Id.* at 81.

In determining whether the search of Garrison's apartment was constitutional, this Court did not simply ask whether officers had a valid search warrant that was supported by probable cause. The Fourth Amendment required resolution of an additional issue. The Court also had to evaluate the "reasonableness of the manner in which [the search warrant] was executed." *Id.* at 84. If the reasoning of the court below had been constitutionally correct, there would have been no need to consider the reasonableness of the manner of the police intrusion in *Garrison*.

The reasoning and result in *Chimel v. California*, 395 U.S. 752, also recognize the principle that lawful authority to be inside a home does not grant officers *carte blanche* discretion in executing their mission. In *Chimel*, officers were lawfully inside the defendant's home to arrest him. After securing the arrest, officers "then looked through the entire three-bedroom house, including the attic, the garage, and a small workshop." *Id.* at 754. No search warrant authorized this search. The search was defended as justifiable, *inter alia*, because the police had probable cause to believe evidence of crime would be found and, without an immediate search, the evidence might be removed or destroyed.

The *Chimel* Court ruled that the search exceeded the proper bounds of a constitutional search incident to a lawful arrest. When confronted with the claim that it was reasonable to search a man's house when he is arrested in it, this

Court noted that such a claim was not supported by "considerations relevant to Fourth Amendment interests." *Id.* at 765. By this, the Court meant that police invasions of a home cannot be "founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct." *Id.* at 764-65. Moreover, the existence of lawful authority to arrest Chimel did not justify an additional intrusion of his privacy and personal security. *Id.* at 767, n.12.[31]

When the principles of the above cases are recalled, it is clear that the ruling below did not apply the correct Fourth Amendment analysis to evaluate the police conduct that occurred at petitioner's home. The Arkansas Supreme Court apparently believed that the existence of a valid search warrant exhausted the constitutional considerations regarding the entry into petitioner's home. The court's premise was wrong for two reasons.

First, it is no longer subject to challenge that *all* searches and seizures -- even ones authorized by a warrant or a recognized exception to the warrant rule -- must ultimately be judged reasonable in order to pass constitutional muster.[32] Second, this Court's prior rulings establish that the reasonableness of a particular search or seizure "depends on not only when a[n intrusion] is made, but also how it is carried out." *Garner*, 471 U.S. at 8. This second constitutional requirement is extremely pertinent when evaluating invasions of an individual's home. In no other place "is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home -- a zone that finds its roots in clear and specific constitutional terms." *Payton*, 445 U.S. at 589.[33] Both of these constitutional commands were ignored by the court below.

The ruling below does not discuss whether the police entry satisfied the standards of reasonableness required by the Fourth Amendment. There is no explanation why this unannounced, forcible, and evening entry was necessary to serve law enforcement interests. All this Court has is the unadorned statement that "[t]here is no authority for [petitioner's] theory that the knock and announce principle is required by the Fourth Amendment." J.A. 77. If the decision below is not overruled by this court, Arkansas law enforcement officials (and countless other state officials who may choose to follow Arkansas' procedure) will be free to break down the doors of a private home -- unannounced and with-

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[31] *See also Buie*, 494 U.S. at 336 (noting that the protective sweep authorized by that case did not depend on the discretion of the police, "but may be conducted only when justified by a reasonable, articulable suspicion that the house is harboring a person posing a danger to those on the arrest scene").

[32] *See, e.g., Maryland v. Buie*, 494 U.S. 325; *Maryland v. Garrison*, 480 U.S. 79; *Ker v. California*, 374 U.S. 23 (1963).

[33] Nothing in *Dalia v. United States*, 441 U.S. 238 (1979), was meant to undermine this rule. There, the defendant argued that a judicial warrant authorizing the installation of electronic surveillance equipment for an office also had to specify that entry would be by covert means. *Dalia* rejected this argument and noted that "it is generally left to the discretion of the executing officers" how to execute a warrant, "subject of course to the general Fourth Amendment protection 'against unreasonable searches and seizures.'" *Id.* at 257. Even if a forcible or unannounced entry was anticipated, *Dalia* merely ruled that a judge was not required to outline "precisely the procedures to be followed by the executing officers." *Id.* at 258. But even the government in *Dalia* conceded "that the manner in which a warrant is executed is subject to later judicial review as to its reasonableness." *Id.* (citation and footnote omitted).

out cause -- whenever they possess a search warrant or think they have grounds satisfying a recognized exception to the warrant requirement.

No precedent of this Court sanctions such broad discretionary powers for police officers. Indeed, when this Court outlined the legal requirements for administrative inspection programs -- which involved official conduct *substantially less* intrusive than the entry of petitioner's home -- the Court made clear that a homeowner has important constitutional interests in being notified of an inspector's presence and the lawful limits of an inspector's authority.[34] Like the administrative inspection program this Court invalidated seventeen years ago, the decision below "leave[s] the occupant subject to the discretion of the official in the field," *Camara*, 387 U.S. at 532, to decide whether the doors of a private home will be broken down without announcement.

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[34] *See Camara v. Municipal Court*, 387 U.S. at 532 ("Under the [challenged] system, when the inspector demands entry, the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization"). *Cf. Michigan v. Clifford*, 464 U.S. 287, 303 (1984)(Stevens, J., concurring in judgment)(emphasizing the constitutional importance of "advance notice" to a homeowner before fire investigators are permitted to a enter a home); *Michigan v. Tyler*, 436 U.S. 499, 514 (1978)(Stevens, J., concurring in part and concurring in judgment)("[T]o comply with the constitutional requirement of reasonableness, I believe the sovereign must provide fair notice of an inspection")(footnote omitted).

IV. THE ANNOUNCEMENT RULE PROMOTES THE PRIVACY AND SECURITY INTERESTS OF A HOMEOWNER, INTERESTS WHICH HAVE BEEN RECOGNIZED BY THE COURT'S FOURTH AMENDMENT CASES

The court below found no constitutional authority for the announcement rule. Implicit in this conclusion is the view that announcement serves no legitimate Fourth Amendment interests. This assessment of the constitutional interests protected by the rule is mistaken.

As Professor LaFave has acknowledged, "[t]he constitutional requirement of announcement serves a number of most worthwhile purposes."[35] These include protecting the homeowner's privacy, *Miller v. United States*, 357 U.S. at 313, and decreasing the likelihood of violence when officers enter a home unannounced, both to those inside the home and to police officers "who might be mistaken, upon an unannounced intrusion into a home, for someone with no right to be there." *Sabbath v. United States*, 391 U.S. 585, 589 (1968). The announcement rule also may reduce the physical destruction of property by giving a homeowner the opportunity to admit the police into the home, and permits "a resident to clarify the purpose of the police intrusion, to demand identification from the officers, or to indicate either that the resident or the premises are mistakenly described in the warrant."[36] Without discrediting most of these constitutional interests, some commentators and courts have questioned whether the announcement rule promotes legitimate

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[35] 2 Wayne R. LaFave, SEARCH AND SEIZURE §4.8(a) at 272 (2d ed. 1987); *see also* Note, *supra* note 21 at 140-42.

[36] Charles Patrick Garcia, Note, *supra* note 24 at 691 (footnote omitted). *See also Camara*, 387 U.S. at 532.

privacy concerns.[37] These criticisms impose an unduly narrow view of the protective shield that the Fourth Amendment places around the home.

This Court generally determines the intrusiveness of police conduct from the perspective of the innocent person. *Florida v. Bostick*, 501 U.S. 429, 438 (1991). By this measure, the announcement requirement undoubtedly serves legitimate Fourth Amendment interests. Critics who claim otherwise ignore the reality of unannounced, forcible police raids.

For example, it was once suggested that the announcement rule advances no legitimate constitutional interest and "benefit[s] the guilty alone."[38] This claim is neither supported by prudent judgment, nor factually accurate. First, on the matter of judgment, over twenty years ago the United States Congress endorsed the view stated by Senator Sam Ervin that "the announcement rule was established to protect the privacy of the home." 120 Cong. Rec. 22884 (July 11, 1974).[39] After previously authorizing federal narcotics officers and District of Columbia police officers to undertake "no knock" search warrants, in 1974 Congress repealed those laws.[40] In revoking the "no knock" authority of federal officers, many members of Congress undoubtedly shared Senator Jacob Javits' conclusion that "the marginal utility of the no-knock provisions is far outweighed by the grave dangers which they pose to the fundamental and constitutionally guaranteed right to privacy." *Id.* at 22886.

Critics of the announcement requirement are also wrong when they assert that this constitutional safeguard only aids guilty persons intent on destroying evidence. Prominent members of the Senate spoke against this narrow conception of the announcement rule. Senator Javits noted that "government agents have abused the no-knock authority to break into the homes of and terrorize unsuspecting and even inno-

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[37] *See* Sonnenreich & Ebner, *supra* note 24 at 647 ("It is difficult to see, however, what actual protection is given to any right of privacy by the announcement rule"); Blakey, *supra* note 10 at 557 ("[T]he real issue in the announcement situation is solely the traditional question of force. Bringing in the amorphous concept of privacy merely confuses the problem").

[38] *State v. Smith*, 181 A.2d 761, 770-71 (N.J. 1962).

[39] In urging his colleagues to repeal federal laws authorizing unannounced searches, then-Senator Lloyd Bentsen stated:

> . . . I am not prepared to sacrifice the liberties secured by the fourth amendment in order to accomplish th[e] purpose [of fighting illegal drugs]. *I do not believe that the road to better law enforcement lies through kicking down the doors of innocent citizens in the course of unannounced, nocturnal raids.*

(continued...)

[39] (...continued)

> *That is not the answer to America's drug abuse problems.*

120 Cong. Rec. at 22905 (emphasis added).

Similarly, Senator Charles Percy, in stating his opposition to unannounced searches, declared:

> [Previous statutes authorizing unannounced searches] were enacted at a time when legitimate concerns about law and order were allowed to overwhelm the interest in preserving the fundamental rights of individual citizens . . . .
>
> Now is the time for us to reaffirm our faith in the constitutional safeguards that are embodied in the fourth amendment. Now is the time for us to recognize once again that all Governmental power is limited so that even the most landable [sic] of goals cannot be pursued by unconstitutional means.

Id. at 22898.

[40] *See* Charles Patrick Garcia, Note, *supra* note 24 at 703-05 (discussing history of federal "no knock" statutes).

cent individuals." *Id.* Senator Bentsen observed that under statutes permitting unannounced searches, "American citizens have been subjected to searches and seizures that more resemble the tactics of a dictatorial police force rather than those of a Federal law-enforcement force." *Id.* at 22905. And Senator Percy stated: "Mistaken drug raids by Federal officers have unfortunately taken place across the country with an alarming frequency. Narcotics agents have sometimes used police-state tactics in making unannounced and unlawful entries into dwellings of decent, law-abiding citizens." *Id.* at 22898.

The invasion of privacy inherent in unannounced intrusions identified by the Senate twenty years ago remain a part of America's current law enforcement landscape.[41] Don Carlson, an executive of a Fortune 500 company, described to a CBS reporter how federal agents entered his home unannounced to execute a narcotics search warrant while he was asleep on the evening of August 25, 1992.

> MR. CARLSON: I stood at the extreme end of that hallway and hollered as loud as I could, "Who's there?"
>
> SAFER: Who did you think was out there?
>
> MR. CARLSON: I thought they were robbers, burglars. I thought my life was in danger.
>
> SAFER: And still no identification.
>
> MR. CARLSON: Nobody ever communicated with me that evening, period.
>
> SAFER (*Voiceover*): Carlson panicked, tried dialing 911, then went for his handgun, returned to the hall and a bomb went off, something police call a "distraction device."
>
> MR. CARLSON: And I fired twice at the front door.
>
> SAFER: Then what?
>
> MR. CARLSON: And then, I'm almost immediately -- I'm hit in this leg and I return . . .
>
> SAFER (*Voiceover*): He staggered back to his bedroom, dropped his gun and collapsed. Twice more he was shot. As he lay bleeding on the floor, Carlson was handcuffed and shackled.
>
> MR. CARLSON: I thought I was in the middle of the worst nightmare I had ever experienced, and -- and -- and I do remember wondering what the hell this was. I did not know. I mean, I couldn't fathom it.[42]

Even critics of the announcement rule are forced to concede that unannounced entries *do* jeopardize the privacy interests of citizens.[43]

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[41] *See* Charles Patrick Garcia, Note, *supra* note 24 (listing and describing incidents where individuals and families have been subjected to unannounced police entries); James Bovard, LOST RIGHTS 234-39 (1994) (same).

[42] CBS News, *60 Minutes*, Vol. XXV, No. 27 at 6-7 (Mar. 28, 1993). No drugs were found in Don Carlson's home. *See* Bovard, *supra* note 41 at 236-37.

[43] *See* Sonnenreich & Ebner, *supra* note 24 at 647 (emphasis added):

> If the door is locked, he may be able to *avoid a broken door* by responding to the demand for entry. If he is engaged in very private activities, perhaps of a carnal nature, or is otherwise indisposed, he may have time to *avoid embarrassment* -- but not interruption. Or if he is asleep, he will be spared the possible *shock of awakening to the sight of a stranger in his home* (entry by stealth), or of *awakening to the sound of a breaking door*.

The right at stake in this case is not about a right to destroy evidence. Nor is the constitutional safeguard of announcement a right that helps only those who traffic in illegal narcotics. Instead, the right to announcement before forcible entry into a home is an ancient right that is embodied in the protection the Fourth Amendment affords to all persons. Indeed, it is an essential part of the "overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic." *Payton*, 445 U.S. at 601. Put simply, this case concerns whether officers shall have the authority to decide for themselves -- free of constitutional restraints -- when the doors of a citizen's home shall be broken down without notice. The cases discussed above indicate that this Court has repeatedly refused to grant police officers the broad discretion to invade a private home that was approved by the court below.

This Case Should Not Be Used To Determine The Type and Scope Of Exceptions To The Announcement Requirement

While the petitioner has conceded that there are exceptions to the constitutional requirement of announcement, Pet. Cert. at 12-13, we believe that this case should not be used as a vehicle to define the types and scope of exceptions to the announcement rule. The Arkansas Supreme Court chose not to discuss this matter; that court only determined that the announcement rule was not compelled by the Fourth Amendment. In analogous contexts, this Court has observed that existence *vel non* of exigent circumstances to enter a home depends upon the facts of a particular case. *Minnesota v. Olson*, 495 U.S. 91, 100-01 (1990); *Warden v. Hayden*, 387 U.S. 294, 298-300 (1967). More importantly, the record below provides no evidence that the officers who entered petitioner's home had a reasonable basis for believing, or even asserted a claim, that an exigency existed to justify

an immediate entry.[44] In this posture, petitioner's case should not be utilized to decide what exceptions are permitted to the constitutional requirement of announcement.

---

[44] Should this Court, however, choose to discuss an exigent circumstance exception to the announcement rule, exigency must be measured by the specific facts confronting police officers in a particular case. An automatic or blanket rule that permits unannounced entry whenever drugs are the object of a search lacks the support of this Court's precedents. *Buie*, 494 U.S. at 336 (rejecting automatic rules, holding a protective sweep permissible only where there is reasonable, articulable suspicion that a home contains a person posing a danger to arresting officers); *Mincey*, 437 U.S. at 392-95 (rejecting claim that every homicide investigation "presents an emergency situation demanding immediate [search]"), *Terry v. Ohio*, 392 U.S. 1 (1968)(rejecting claim authorizing frisk for weapons in every street encounter).

Moreover, the blanket drug exception adopted by a few courts is not supported by either the plurality or dissenting opinions in *Ker*, *see* LaFave, *supra* note 35 at 281, and defies the "central teaching of this Court's Fourth Amendment jurisprudence" -- which is -- "a demand for specificity in the information upon which police action is predicated." *Terry*, 392 U.S. at 21, n.18.

As Justice Traynor has recognized:

> Under the Fourth Amendment, a specific showing must always be made to justify any kind of police action tending to disturb the security of the people in their homes. Unannounced forcible entry is in itself a serious disturbance of that security and cannot be justified on a blanket basis. Otherwise the constitutional test of reasonableness would turn only on practical expediency, and the amendment's primary safeguard -- the requirement of particularity -- would be lost. Just as the police must have sufficiently particular reason to enter at all, so must they have some particular reason to enter in the manner chosen.

People v. Gastelo, 432 P.2d 706, 708 (1967).

CONCLUSION

For the reasons stated above, the judgment of the Arkansas Supreme Court should be reversed.

Respectfully submitted,

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APPENDICES

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APPENDIX A

The following is a list of lower federal court and state court rulings that have adopted the announcement requirement either as a matter of constitutional law or as a matter of common law:

Federal Cases

Rivera v. U.S., 928 F.2d 592 (2d Cir. 1991)

Hall v. Shipley, 932 F.2d 1147 (6th Cir. 1991)

U.S. v. Buckley, 4 F.3d 552 (7th Cir. 1993), *cert. denied*, 62 U.S.L.W. 3552 (Feb. 22, 1994)(No. 93-7062)

U.S. v. Moore, 956 F.2d 843 (8th Cir. 1992)

State Cases

People v. Jacobs, 729 P.2d 757 (Cal.1987)

State v. Anonymous, 308 A.2d 251 (Conn. 1973)

Tatman v. State, 320 A.2d 750 (Del. 1974)

State v. Bamber, 630 So.2d 1048 (Fla. 1994)

State v. Davenport, 516 P.2d 65 (Haw. 1973)

State v. Rauch, 586 P.2d 671 (Idaho 1978)

State v. Dusch, 289 N.E.2d 515 (Ind. 1972)

State v. Cohrs, 484 N.W.2d 223 (Iowa App. 1992)

Commonwealth v. Gomes, 556 N.E.2d 100 (Mass. 1990)

People v. Polidori, 476 N.W.2d 482 (Mich.App. 1991), *aff'd*, 479 N.W.2d 636 (Mich.), *cert. denied*, 113 S.Ct. 298 (1992)

State v. Prudhomme, 287 N.W.2d 386 (Minn. 1979)

State v. Pierson, 472 N.W.2d 898 (Neb. 1991)

State v. Matos, 605 A.2d 223 (N.H. 1992)(common law)

State v. Love, 558 A.2d 15 (N.J.Super.A.D. 1989)(common law)

State v Attaway, 870 P.2d 103 (N.M. 1994)

People v. De Lago, 213 N.E.2d 659 (N.Y. 1965), *cert. denied*, 383 U.S. 963 (1966)

State v. Prevette, 259 S.E.2d 595 (N.C.App. 1979), *rev. denied*, 261 S.E.2d 925 (N.C.); *cert. denied*, 447 U.S. 906 (1980)

State v. Sakellson, 379 N.W.2d 779 (N.D. 1985)

State v. Valentine, 598 N.E.2d 82 (Ohio App. 4 Dist. 1991)

Erickson v. State, 597 P.2d 344 (Okla.Crim.App. 1979)

State v. Valentine, 504 P.2d 84 (Or. 1972), *cert. denied*, 412 U.S. 948 (1973)

Commonwealth v. Grubb, 595 A.2d 133 (Pa.Super. 1991)

State v. Carufel, 314 A.2d 144 (R.I. 1974)

State v. Ribe, 876 P.2d 403 (Utah App. 1994)

Wynne v. Commonwealth, 427 S.E.2d 228 (Va.App. 1993)

Heaton v. Commonwealth, 207 S.E.2d 829 (Va. 1974)

State v. Garcia-Hernandez, 837 P.2d 624 (Wash.App.Div. 1992)

Lobatos v. State, 875 P.2d 716 (Wyo. 1994)

APPENDIX B

The following is a list of the states with statutory knock and announce requirements:

Ala. Code §15-5-9 (1992)(search warrant);

Alaska Stat. §12.25.100 (1990)(arrest);

Ariz.Rev.Stat.Ann. §13-3891 (1989)(arrest);
Ariz.Rev.Stat.Ann. §13-3916 (1989)(search warrant);

Ark. Code Ann. §16-81-107 (Michie 1987)(arrest);

Cal. Penal Code §844 (West 1994)(arrest; origins dating to 1872);
Cal. Penal Code §1531 (West 1989)(search warrant; origins dating to 1872);

D.C. Code Ann. §33-565 (1991)(search warrant for controlled substances);

Fla.Stat.Ann. §901.19(1)(West 1985)(arrest; origins dating to 1939);
Fla.Stat.Ann. §933.09 (West 1985)(search warrant; origins dating to 1923);

Ga. Code Ann. §17-5-27 (1990)(search warrant);

Haw.Rev.Stat. §803-11 (1994)(arrest);

Idaho Code §19-611 (1987)(arrest; origins dating to 1864);
Idaho Code §19-4409 (1987)(search warrant; origins dating to 1864);

Ind. Code Ann. §35-33-5-7 (West 1986)(search warrant);

Iowa Code Ann. §808.6 (West 1994)(search warrant; origins dating to 1851);

La. Code Crim.Proc.Ann. art. 224 (West 1991)(arrest; origins dating to 1928);

Mich.Comp. Laws Ann. §764.21 (West 1994)(arrest);
Mich.Comp. Laws Ann. §780.656 (West 1982)(search warrant);

Minn.Stat. §629.34 (1994)(arrest);

Miss. Code Ann. §99-3-11 (1972)(arrest);

Mo.Rev.Stat. §105.240 (1966)(arrest and search warrants; origins dating to 1939);
Mo.Rev.Stat. §544.200 (1987)(arrest);

Nev.Rev.Stat. §171.138 (1967)(arrest);
Nev.Rev.Stat. §179.055 (1967)(search warrant);

N.Y.Crim.Proc. §690.50 (McKinney 1993)(search warrant);

N.C.Gen.Stat. §15A-251 (1988)(search warrant);
N.C.Gen.Stat. §15A-401 (1992)(arrest);

N.D.Cent. Code §29-06-14 (1991)(arrest; origins dating to 1877);
N.D.Cent. Code §29-29-08 (1991)(search warrant; origins dating to 1877);

Ohio Rev. Code Ann. §2935.12 (1993)(arrest and search warrant);

Okla.Stat.Ann. tit. 22, §197 (1992)(arrest; origins dating to 1887);
Okla.Stat.Ann. tit. 22, §1228 (1995)(search warrant);

Or.Rev.Stat. §133.235 (arrest);

Pa.R.Crim.P. Rule 2007 (1989)(search warrant);

S.D. Codified Laws Ann. §23A-35-8 (1988)(search warrant; origins dating to 1877);

Tenn. Code Ann. §40-7-107 (1990)(arrest; origins dating to 1858);
Tex.Crim.Proc. Code Ann. art. 15.25 (West 1977)(arrest);

Utah Code Ann. §77-7-8 (1990)(arrest);

Wash.Rev. Code §10.31.040 (1992)(arrest; origins dating to 1881);

W.Va. Code §62-1A-5 (1992)(search warrant);

Wyo.Stat. §7-7-104 (1987)(search warrant);
Wyo.Stat. §7-8-104 (1987)(arrest; origins dating to 1876).

Supreme Court, U.S.
FILED
JAN 23 1995
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No. 94-5707

In The
Supreme Court of the United States
October Term, 1994

SHARLENE WILSON,
Petitioner,

vs.

STATE OF ARKANSAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF ARKANSAS

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., THE INTERNATIONAL NARCOTIC ENFORCEMENT OFFICERS ASSOCIATION, INC., THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., AND THE NATIONAL SHERIFFS' ASSOCIATION, IN SUPPORT OF THE RESPONDENT.

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IN SUPPORT OF THE RESPONDENT.

This Brief is filed pursuant to Rule 37 of the United States Supreme Court. Consent to file has been granted by respective Counsel for the Petitioner and Respondent. The letters of consent have been filed with the Clerk of this Court, as required by the Rules.

INTEREST OF AMICI CURIAE

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties, and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* one hundred times in the Supreme Court of the United States and over thirty-five times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio, and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 14,000 members in 72 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The International Narcotic Enforcement Officers Association, Inc. (INEOA), is the largest organization of drug law enforcement officers in the world, consisting of more than 10,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among law enforcement officers. It is interested in the effective administration of justice and in protecting the safety and rights of law enforcement as well as respecting the rights guaranteed to all under the Constitution.

The National District Attorneys Association, Inc. (NDAA), is a nonprofit corporation and the sole national organization representing local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publications, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

The National Sheriffs' Association (NSA), is the largest organization of sheriffs and jail administrators in America, consisting of over 40,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among the Nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting the rights guaranteed to all under the Constitution.

Amici are national professional associations representing the interests of law enforcement agencies at the state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of executing and overseeing the process of search warrants within the bounds of the law, and (2) prosecutors and police legal advisors who, in their criminal jurisdiction capacity, are called upon to advise law enforcement officers and administrators in connection with such matters and to prosecute cases involving evidence obtained as a result of searches conducted pursuant to warrants.

Because of the relationship with our members, and the composition of our membership and directors—including active law enforcement administrators and counsel—we possess direct knowledge of the impact of the ruling of the court below, and we wish to impart that knowledge to this Court.

ARGUMENT

I.
THE FOURTH AMENDMENT DOES NOT ENCOMPASS A COMMON LAW RULE OF "KNOCK AND ANNOUNCE."

The common law rule as stated in the defendant's brief to the effect that a police officer must announce his office and purpose before entering premises to execute a search warrant, is derived from the ancient English decision in *Semayne's Case*, 5 Coke 91, 77 Eng. Rep. 194 (K.B. 1603). Although the rule was followed in colonial America in the English writs of assistance statutes so despised by the colonists in the early 1770s, those statutory expressions of the rule constituted the English common law, not American common law. See Note, 80 Yale L.J. 139, 145 (1970).

The constitutional question, therefore, is simply whether the adoption of the Fourth Amendment in 1791, or by some other process, effected an incorporation of the common law rule. If it did, such incorporation would be evidenced in the reasonableness requirement of the Fourth Amendment, since there is obviously no specific reference to the rule in the language of the Amendment itself.

Indeed, it was not until 1813 in the case of *Bell v. Clapp*, 10 Johns R. 263 (N.Y. Sup. Ct. 1813), that an *American* court first made reference to the rule with respect to the execution of search warrants. Thereafter the common law rule was adopted by some courts in the United States, subject to some exceptions, both judicial and statutory. See Blakey, *The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California*, 112 U. PA. L. REV. 499, 504-08 (1964), and 2 W. LAFAVE, SEARCH AND SEIZURE § 4.8, p. 271 (2d ed. 1987).

It is thus doubtful that the rule was a part of American common law at the time of the adoption of the Fourth Amendment and it is likewise doubtful that the Framers intended the English rule to be incorporated *sub silentio*.

Indeed this Court has had at least three opportunities to consider the question, but in none of the cases did it make the rule a constitutional requirement. *Ker v. California*, 374 U.S. 23 (1963); *Miller v. United States*, 357 U.S. 301 (1958); *Sabbath v. United States*, 391 U.S. 585 (1968). In the authority most ardently relied upon by the defendant in this case, i.e., *Ker*, only a minority of the Justices of this Court believed that the rule was required by the Fourth Amendment.

On the other hand, this Court has spoken decisively on the constitutional manner for execution of warrants, and when it has done so it has spoken in terms of flexibility and discretion left to the jurisdictions to adopt reasonable rules to protect vital interests. In *Ker*, for example, the majority stated that

> The States are not thereby precluded from developing workable rules governing arrest, searches and seizures to meet "the practical demands of effective criminal investigation and law enforcement" in the states, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain . . .

374 U.S. 23 at 34.

In *Dalia v. United States*, 441 U.S. 238 (1979), a case dealing with the execution of an order for electronic surveillance (covert entry), this Court said:

> Nothing in the language of the Constitution or in this

Court's decisions interpreting that language suggests that, in addition to the three requirements discussed above [probable cause, particular description of place to be searched, particular description of things to be seized], search warrants also must include a specification of the precise manner in which they are to be executed. On the contrary, it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant—subject of course to the general Fourth Amendment protection "against unreasonable searches and seizures." * * *

It would extend the warrant clause to the extreme to require that, whenever it is reasonably likely that Fourth Amendment rights may be affected in more than one way, the court must set forth precisely the procedures to be followed by the executing officers. Such an interpretation is unnecessary, as we have held —and the Government concedes—that the manner in which a warrant is executed is subject to later judicial review as to its reasonableness.

441 U.S. 238 at 257.

Flexibility and practicality—whether with or without common law considerations—has long been the approach of this Court in dealing with the practical problems of law enforcement that fall within the purview of the Fourth Amendment. Thus, in *Terry v. Ohio*, 392 U.S. 1 (1968), the Court recognized that police officers must have flexibility greater than that allowed by the Fourth Amendment probable cause requirement to deal with potentially dangerous confrontations with criminal suspects and adopted the reasonable suspicion standard. Additionally, in *New York v. Belton*, 453 U.S. 454 (1981), the Court adopted a bright line rule for the search of motor vehicles that comported with the practical exigencies that officers face in dealing with custodial arrests

of occupants of vehicles. And finally in *United States v. Leon*, 468 U.S. 897 (1984), this Court recognized the essentially practical basis for the Fourth Amendment exclusionary rule, i.e., deterrence, and ruled in favor of a Fourth Amendment jurisprudence bound not by technicalities but by the practical realities of the difficult and dangerous tasks of law enforcement officers in the real world of the Twentieth Century.

Many more examples could be given, but *amici* simply request that the Court—as it has in the past—give due deference to the practical realities of law enforcement, and not be bound in terms of a constitutional imperative by a case and the common law of another country, be it ever so important to our shared jurisprudence with England. Indeed, the glowing triumph of the common law has always been its ability to grow and adapt to the needs of changing times and not to make permanent rules for the sake of permanency itself. The needs of 1995 are not the needs of 1603 that were the basis for the *Semayne* decision of that year.

II.

THIS COURT SHOULD ADOPT A BRIGHT LINE RULE PERMITTING NO KNOCK SERVICE OF SEARCH WARRANTS UNDER CIRCUMSTANCES INVOLVING TERRORISM, DRUGS, AND OTHER SITUATIONS WHERE A REASONABLE SUSPICION OF ARMED CONFRONTATION EXISTS.

While many federal and state courts have held or simply assumed that the knock and announce rule is embodied in the Fourth Amendment, see, e.g., *Rivera v. United States*, 928 F.2d 592 (2d Cir. 1991); *United States v. Mueller*, 902 F.2d 336 (5th Cir. 1990); *People v. Gonzalez*, 211 Cal. App. 3d 1043 (1989); *State v. Valentine*, 264 Or. 54 (1972), some jurisdictions have disagreed, see, e.g., *Commonwealth v.*

Goggin, 412 Mass. 200 (1992); *People v. Saechao*, 129 Ill. 2d 522 (1989), and have taken the position that it is not constitutionally required.

Whether holding or assuming a constitutional requirement —or not—many states have also adopted statutes permitting no knock entries for the service of search warrants and the use of force to take into consideration the dangers faced by law enforcement officers in this type of activity. Typical among them is the Illinois Code of Criminal Procedure (725 ILCS § 5/108-8):

> Use of Force in Execution of Search Warrant.
>
> (a) All necessary and reasonable force may be used to effect an entry into any building or property or part thereof to execute a search warrant.
>
> (b) Upon a finding by the judge issuing the warrant that any of the following exigent circumstances exist, the judge may order the person executing the warrant make entry without first knocking and announcing his office:
>
> (1) the presence of firearms or explosives in the building in an area where they are accessible to any occupant;
>
> (2) the prior possession of firearms by an occupant of the building within a reasonable period of time;
>
> (3) the presence of surveillance equipment, such as video cameras, or alarm systems, inside or outside of the building;
>
> (4) the presence of steel doors, wooden planking, crossbars, dogs, or other similar means of preventing or impeding entry into the building.

Statutes such as this—and also many rules and policies of law enforcement agencies within *amici's* constituency—simply recognize the paramount importance of officer safety in cases involving terrorism (where weapons are virtually

always present) and drugs (where in today's illegal marketplace, much the same can be said).

Indeed there is good reason for this, a reality that even the defendant concedes in her petition for review in this case. At page 12 of the Petition for Writ of Certiorari to the Arkansas Supreme Court, defendant states that ". . . there are hundreds of millions of firearms in American homes . . ."—a fact clearly recognized by every school child, parent, employer, and virtually every other person in America.

No one today knows this bit of Twentieth Century Americana better than state and federal law enforcement officers. In just 10 years, from 1982 to 1992 (the last year for which statistics are available), the number of assaults with a firearm upon law enforcement officers resulting in a personal injury to the officer almost doubled—from 2,642 in 1982 to 4,455 in 1992. For all types of weapons used in assaults upon officers resulting in personal injury to the officer, the figures rose from 55,775 in 1982 to 81,252 in 1992. See Bur. Justice Stat. Sourcebook of Crim. Jus. Stat. 1993, Table 3.163. *Amicus* International Narcotic Enforcement Officers Association, Inc., in particular has collected many examples of officers injured and killed during the execution of search warrants and annually awards commendations and honors to those officers for their bravery.[1]

These are the practical realities that defendant overlooks in the discussion of constitutional issues. Those issues are of

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[1] *Amici* note that there often is uncertainty in drug raids. One or more armed and dangerous persons, who are not residents, might be on the premises at the time a search warrant is served. This could include the suspect's supplier of drugs.

great interest to constitutional scholars, and indeed to all of us, but take on a different cast when law enforcement officers face the reality of the potential for meeting weapons head on almost every time they execute a search warrant on certain types of premises, whether it be a terrorism case or one involving a misdemeanor possession of drugs.

Another reality they face is that when the warrant is for drugs, the contraband is almost always in an easily destructible format and is likely to be on its way down a toilet or sink bowl before an officer can get through the door after having announced his presence and purpose. The entire industry of illegal drugs in America today is geared to two principles—the destructibility of evidence when apprehension approaches and the need to use force to prevent apprehension.

This Court has not hesitated in the past to design bright line rules for law enforcement related to safety and the destruction of evidence. See, *Terry* and *Belton*, *supra*. Nor has it ignored the reality that in the final analysis the Fourth Amendment must not merely protect abstract rights and principles, but must also observe and serve actual human behavior, i.e., deterrence. See, *Leon*, *supra*.

***Amici*, therefore, respectfully request this Court to resolve the constitutional issue in a manner preserving a bright line rule for federal and state law enforcement officers to the effect that when properly issued search warrants for premises (as was true in this instance) are executed in cases involving terrorism, drugs, or in other circumstances where officers possess reasonable suspicion that subjects within the premises may be armed and dangerous—or simply possess weapons—their unannounced entry of the premises to execute the warrant comports with the Reasonableness Clause of the Fourth**

Amendment.[2]

Such a rule would encourage the states to continue the process of statutory regulation of the execution of search warrants—a proper legislative concern—and law enforcement agencies and prosecutors to continue the process of administrative regulation of the subject—through policies, rules, protocols, and discipline of officers who abuse their discretion.

For persons who are aggrieved by the conduct of an officer in a particular case, the presence of an adequate civil remedy such as 42 U.S.C. § 1983 (as made accessible to any plaintiff with a case having merit—in effect through the ability to have counsel fees and costs established for the "prevailing" party through 42 U.S.C. § 1988), and the tort law of every state, would continue to serve as an effective means for both redress and deterrence, in lieu of suppression of evidence.

Amici submit that such a bright line rule is both reasonable, as measured by the Fourth Amendment, and necessary, as measured by the increasing dangers that officers face in executing search warrants. Such a rule would constitute the appropriate balance that this Court seeks to achieve between the personal rights of freedom for our citizens and the necessity of government to protect itself and its law enforcement officers. Based upon our experience as law enforcement officers, administrators, prosecutors, and legal

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[2] This would assume, of course, that the officers did not use force incommensurate with the totality of the circumstances known to them. *Graham v. Connor*, 490 U.S. 386 (1989) (adopting the Fourth Amendment objective reasonableness standard for seizures not involving the use of deadly force).

advisors, we assure this Court that such a rule is necessary to protect the lives of law enforcement officers and preserve evidence. It is as necessary as were the bright line rules fashioned by this Court in *Terry v. Ohio* and *New York v. Belton*.

CONCLUSION

Amici urge this Court to affirm the decision of the court below on the basis of the precedents of this Court and sound judicial policy.

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In the
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October Term, 1994

SHARLENE WILSON,

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STATE OF ARKANSAS,

Respondent.

On Writ of Certiorari to the Supreme Court of Arkansas

BRIEF OF THE STATE OF CALIFORNIA, et al. AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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BRIEF OF THE STATE OF CALIFORNIA, et al. AS AMICI CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICI CURIAE

Petitioner asks the Court to limit the discretion of police officers in performing one of the most dangerous parts of their job: the service and execution of a search warrant. The service of a warrant on a residence that has been determined by a neutral and detached magistrate as likely to harbor evidence of a crime can be expected to provoke a less-than-enthusiastic response from its

occupants. For that reason, the best method of approaching a house to execute a warrant, whether openly or by stealth, by ruse or by surprise, depends peculiarly on the experience, knowledge, and hunches of the officer, whose life, after all, is at stake. These decisions must be made on the scene, usually within a matter of moments, and require split-second correction or modification.

Amici states have a direct and substantial interest in insuring that law enforcement officers have as a matter of law the discretion necessary to protect their own lives in the performance of their duties. Some *amici* have statutes that govern the method by which the police may gain entry to a dwelling (Pet.Br., App. A); some have adopted rules by common-law adjudication (Pet.Br., App. B); and still others leave such decisions to the officers at the scene (Pet.Br., App. D). Yet, *all* of the states joined herein agree that the federal Constitution does not compel the exclusion of evidence that is lawfully seized merely on the ground that the officers failed to announce their identity and purpose prior to entering the place to be searched.

SUMMARY OF ARGUMENT

The pistol, narcotics, and other paraphernalia found in Petitioner's home were seized during a search authorized by a concededly lawful search warrant. Prior to the search, the police observed the occupants through the screen door, simultaneously identified themselves, stated they had a search warrant, and entered Petitioner's home to execute the warrant. J.A. 41-42. Even if (as

Petitioner contends) this method of entry were illegal, she nonetheless cannot obtain any relief in this proceeding. The Constitution does not require exclusion of evidence seized under the authority of a lawful warrant, even if the entry to execute the warrant was not preceded by an announcement.

When the police make a warrantless illegal entry and only later obtain a search warrant, the warrant is deemed an "independent source" for evidence seized during its execution, so long as the warrant was based on information acquired prior to the entry. *Murray v. United States*, 487 U.S. 533 (1988); *Segura v. United States*, 468 U.S. 796 (1984). A fortiori, when the initial entry is supported by a warrant yet is not preceded by an announcement, the warrant remains an "independent source" for evidence discovered during its execution. Moreover, even if the officers had complied with a hypothetical knock-and-announce requirement, the warrant would have authorized them to conduct the search they did, rendering the evidence admissible under the "inevitable-discovery" doctrine as well. *Nix v. Williams*, 467 U.S. 431 (1984).

Where the police have a warrant that authorizes entry and a search, the exclusionary rule cannot be effective in deterring unannounced entries. Either an announced *or* unannounced entry, depending on the circumstances, can pose a danger for an officer executing a warrant. A rational officer with a search warrant would choose to enter unannounced only if necessary to protect officer safety or to avoid the destruction of

evidence—both of which, Petitioner concedes, justify an unannounced entry under the Constitution. (Pet.Br. 63.) The exclusionary rule is neither a necessary nor useful remedy for those infrequent situations in which a reviewing court may in hindsight disagree with the choice made by the officer.

Thus, the Court should affirm the judgment below, if not on the ground urged by respondent, then on the ground that is the focus of this amicus brief: that the exclusionary rule does not require the suppression of evidence seized pursuant to a valid warrant solely because entry was not preceded by an announcement. Relying on the latter ground accords with the "well-settled doctrine of this Court" of avoiding constitutional questions where there is some other ground on which to dispose of the case. *See Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207, 211 (1960).

ARGUMENT

I. THE EXCLUSIONARY RULE SHOULD NOT BE EXTENDED TO EVIDENCE SEIZED DURING THE EXECUTION OF A VALID, UNTAINTED SEARCH WARRANT AS A SANCTION FOR AN ANTECEDENT UNANNOUNCED ENTRY

The police seized a semi-automatic pistol, a quantity of methamphetamine, and other drug paraphernalia supporting Petitioner's convictions during the execution of a lawful search warrant supported by probable cause. Neither the validity of the warrant nor the scope of the search is at issue in the petition. Rather, Petitioner argues only that the way the police entered her home—i.e., by identifying themselves as having a warrant, through the screen door, simultaneously with their entry—violated the Fourth Amendment and rendered the subsequent search invalid.

Respondent believes that the existence of a valid warrant, supported by probable cause, exhausts the Fourth Amendment inquiry. Whether the police announce their identity and purpose as they enter or seconds prior to entering should not render unconstitutional a search authorized by a valid warrant.

However, the judgment below should be affirmed without reaching the constitutional question. Even if the Court were to find that the method of entering a house to execute a warrant is subject to Fourth Amendment

scrutiny, contraband seized under the authority of a valid search warrant is admissible under the "independent-source" and "inevitable-discovery" exceptions to the exclusionary rule. The rule, which is a "pragmatic" remedy, *Stone v. Powell*, 428 U.S. 465, 488 (1976), should not be extended to bar the admission of evidence that could have been seized—and, in fact, *was* seized—under the authority of a valid search warrant.

Disposing of the case on the alternate ground set forth in this brief accords with the well-settled prudential doctrine of avoiding the unnecessary resolution of difficult constitutional questions, which "carries a special weight in maintaining proper harmony in federal-state relations." *See Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207, 211-212 (1960). The applicability of the exclusionary rule, which is not itself compelled by the Constitution, *United States v. Calandra*, 414 U.S. 338, 348 (1974), presents a purely legal question that can be addressed by this Court without the benefit of lower court analysis. *See United States v. Locke*, 471 U.S. 84, 92 n.9, 93 (1985).

A. A Valid Search Warrant, Supported By Probable Cause, Provides An "Independent Source" For The Discovery Of Evidence Seized During Its Execution, Notwithstanding A Prior Unannounced Entry

The Court has invoked the exclusionary rule to suppress both the direct and the indirect products of a Fourth Amendment violation. *Murray v. United States*, 487 U.S. 533, 536-537 (1988); *Wong Sun v. United States*, 371 U.S. 471, 484-485 (1963). In either case, suppression is

appropriate only if, at a minimum, "the challenged evidence is in some sense the product of illegal governmental activity." *United States v. Crews*, 445 U.S. 463, 471 (1980). The test for determining whether evidence is the product or "fruit" of a prior illegality is whether "the illegality is at least the 'but for' cause of the discovery of the evidence." *Segura v. United States*, 468 U.S. 796, 815 (1984).

In this case, the search warrant—not the unannounced entry—was the "but-for" cause. Or, to put it another way, the same search would have ensued even if the officers had announced their entry. The existence of a valid warrant, which was sought and issued on the basis of information developed prior to any illegal entry, thus provided an "independent source" for evidence seized during its execution. *Murray*, 487 U.S. at 541; *Segura*, 468 U.S. at 799. Here, as in *Segura* and *Murray*, the relationship between the illegal entry and the subsequent search consisted solely of the fact that the former preceded the latter in time. As *Murray* and *Segura* held, this is insufficient to establish legal causation.

In *Segura*, the police developed probable cause to believe that evidence would be found at the defendant's residence and decided to obtain a warrant. Prior to securing the warrant, however, the officers arrested Segura, made an illegal, warrantless entry into his apartment, and conducted an unjustified protective sweep of the premises, apparently to prevent the destruction of evidence. Nineteen hours later, when the warrant was issued, the police searched the apartment. 468 U.S. at

800-801. Segura (like Petitioner) claimed that the evidence seized after the illegal entry and occupation of the premises should have been excluded as the fruit of the illegality. *Id.* at 813. The Court squarely rejected this theory of causation:

> Whether the initial entry was illegal or not is irrelevant to the admissibility of the challenged evidence because there was an independent source for the warrant under which that evidence was seized. . . . [¶] None of the information on which the warrant was secured was derived from or related in any way to the initial entry into petitioners' apartment; the information came from sources wholly unconnected with the entry and was known to the agents well before the initial entry. No information obtained during the initial entry or occupation of the apartment was needed or used by the agents to secure the warrant. It is therefore beyond dispute that the information possessed by the agents before they entered the apartment constituted an independent source for the discovery and seizure of the evidence now challenged.

Id. at 813-814.[1/]

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1. The dissent agreed that evidence discovered and seized during a warrant-authorized search should not be suppressed unless the illegal entry was the "but-for"

Four years later, in *Murray*, the Court revisited the issue of whether evidence seized under a lawful warrant could be the fruit of an antecedent illegal entry. The police made a forcible, warrantless, and illegal entry into a warehouse where the defendant had recently been seen and found numerous burlap-wrapped bales of marijuana in plain view. The police then exited the warehouse, kept it under surveillance, and did not reenter until they had obtained a warrant, eight hours later. 487 U.S. at 535-536. Murray attempted to distinguish *Segura* by pointing out that the bales of marijuana, unlike the evidence seized in *Segura*, had been observed during the officers' initial illegal entry. The Court again rejected a purely temporal theory of causation:

> Knowledge that the marijuana was in the warehouse was assuredly acquired at the time of the unlawful entry. But it was also acquired at the time of entry pursuant to the warrant, and if the later acquisition was not the result of the earlier entry there is no reason why the independent source doctrine should not apply. . . . [¶] The ultimate question, therefore, is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here. This would not have been the case if the agents'

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cause of the seizure. *Id.* at 827, 829-830 (Stevens, J., dissenting) ("causation is a necessary but not a sufficient condition for exclusion").

> decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant.

Id. at 541-542 (footnote omitted).

Evidence seized under a valid warrant following an unannounced entry is a far more attractive candidate for application of the independent-source doctrine than the evidence seized after warrantless entries in *Murray* and *Segura*. *See, e.g., United States v. Marts*, 986 F.2d 1216, 1221 (8th Cir. 1993) (Fagg, J., dissenting). Not only was the information supporting the warrant "wholly unconnected with the entry and . . . known to the agents well before the initial entry," *Segura*, 468 U.S. at 814, but the *warrant itself*, which was obtained before any illegal entry, is likewise unconnected to it. Indeed, the existence of the warrant at the time of the entry dispels the *Murray* dissenters' concern that "[i]t normally will be difficult for the trial court to verify, or the defendant to rebut, an assertion by officers that they always intended to obtain a warrant, regardless of the results of the illegal search." 487 U.S. at 547 (Marshall, J., dissenting).

A contrary rule would have perverse consequences. If the police are permitted to rely on the independent-source doctrine for warrantless illegal entries but not for illegal entries supported by a warrant, they will be discouraged from using the warrant procedure. Instead, a cautious officer would choose to make a warrantless,

unannounced entry, secure the premises, and then return with a warrant to conduct a search—turning the Fourth Amendment's "strong preference for warrants," *United States v. Leon*, 468 U.S. 897, 914 (1984), on its head.

In addition, exclusion of evidence based solely on an unannounced entry, despite the existence of a valid search warrant, would violate a cardinal tenet of this Court's Fourth Amendment jurisprudence: that the police not be put in a worse position than if the violation had not occurred. *Murray*, 487 U.S. at 541; *Nix v. Williams*, 467 U.S. 431, 443 (1984); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920). The mere existence of an illegality preceding the execution of a warrant should not render the evidence thereby seized inadmissible unless the illegality is causally related to the seizure. *See, e.g., Waller v. Georgia*, 467 U.S. 39, 43-44 n.3 (1984); *McGuire v. United States*, 273 U.S. 95, 99 (1926) ("A criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to rule"). Under this Court's well-established case law on causation, the exclusionary rule cannot be applied here.

B. Evidence Seized During The Warrant-Search Would Inevitably Have Been Discovered Had An Unannounced Entry Not Occurred

Even if the evidence seized in accordance with the warrant is deemed to be a fruit of the earlier unannounced entry, it is nonetheless admissible under the inevitable-discovery doctrine. The inevitable-discovery doctrine, like the independent-source exception, "ensures that the prosecution is not put in a *worse* position simply because of some earlier police error or misconduct." *Nix v. Williams*, 467 U.S. 431, 443 (1984). When the challenged evidence has an independent source, exclusion puts the police in a worse position than would have occurred in the absence of any error or violation. Likewise, when the evidence would inevitably have been discovered, exclusion puts the government in a worse position, "because the police would have obtained that evidence if no misconduct had taken place." *Id.* at pp. 443-444.

In *Nix*, the defendant was arrested for the murder of a young girl. Her body was the subject of a county-wide search but had not yet been found. The arresting officers, in a manner the Court found to violate the Sixth Amendment, elicited from the defendant a statement of the victim's location. Based on that statement, the police recovered the body before the search party reached the site. Although the defendant's statement was suppressed as a fruit of the Sixth Amendment violation, the Court held that the evidence concerning the discovery of the body, which was a fruit of the same violation, was

admissible at trial because the body would inevitably have been discovered by the search party. *Id.* at 448.

Here, it is undisputed that the officers had a valid warrant that permitted at least this much: entry into Petitioner's home, after an announcement of their identity and purpose, and a search of the premises. Thus, had the unannounced entry not occurred, the police still would have entered the home and discovered the contraband. Suppression of the evidence would put the police in a worse position than would have occurred in the absence of the violation. And, unlike other applications of the inevitable-discovery doctrine, the conclusion that the evidence in this case would inevitably have been discovered requires neither speculation nor a leap of faith but is established to a certainty by the fact of the warrant. *Compare id.* at 459-460 (Brennan, J., dissenting).

The sole circumstance in which evidence seized after an unannounced entry might arguably fall outside the inevitable-discovery doctrine is where the police were correct in their suspicion that evidence would have been destroyed had they announced their purpose, but a reviewing court nonetheless found that the record prior to entry was insufficient to support that belief. Although the entry might then theoretically be deemed the "cause" of the discovery of the not-yet-destroyed evidence, this Court's sound refusal to recognize a constitutional right to destroy evidence renders the exclusionary rule inapplicable even in that circumstance:

It may be that, if the agents had not entered the apartment, petitioners might have arranged for the removal or destruction of the evidence, and that in this sense the agents' actions could be considered the "but for" cause for discovery of the evidence. But at this juncture, we are reminded of Justice Frankfurter's warning that "[s]ophisticated argument may prove a causal connection between information obtained through [illegal conduct] and the Government's proof," and his admonition that the courts should consider whether "[a]s a matter of good sense . . . such connection may have become so attenuated as to dissipate the taint." [Citation.] The essence of the dissent is that there is some "constitutional right" to destroy evidence. This concept defies both logic and common sense.

Segura, 468 U.S. at 816. Indeed, *Nix* itself applied the inevitable-discovery doctrine in a case where the police had failed to show that their misconduct was not willful:

> The requirement that the prosecution must prove the absence of bad faith . . . would place courts in the position of withholding from juries relevant and undoubted truth that would have been available to police absent any unlawful police activity. Of course, that view would put the police in a *worse* position than they would have been in if no unlawful conduct had transpired. And, of equal importance, it wholly fails to take into account the enormous societal cost of excluding truth in the search for truth in the administration of justice. Nothing in this Court's prior holdings supports any such formalistic, pointless, and punitive approach.

467 U.S. at p. 445.

The same analysis is appropriate for violations of a hypothetical knock-and-announce requirement. As a threshold matter, no violation occurs if the police reasonably believe that their peril would be increased or that evidence would be destroyed if their entry were preceded by an announcement of identity and purpose. *See, e.g., Ker v. California*, 374 U.S. 23, 40 (1963) (plurality opinion); *Miller v. United States*, 357 U.S. 301, 309 (1958); Pet.Br. 63. Moreover, because of the risks attendant to an unannounced entry, officers are unlikely to make one without a genuine belief that one or both of these conditions exist. Only a trivial deterrent effect could be achieved by applying the exclusionary rule to those situations where the court and the police later disagree over the reasonableness of the officers' assessment that their lives were endangered or that evidence might be destroyed.[2/] A refusal to apply the exclusionary rule in

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2. Petitioner and *amici* ACLU, et al., suggest that the knock-and-announce rule is necessary to protect "innocent" persons from being "terrorize[d]" by the

such situations does not condone the misconduct; it simply recognizes that, due to its substantial societal costs, invocation of the rule must result in "appreciable deterrence." *United States v. Janis*, 428 U.S. 433, 454 & n.28 (1976).

C. Suppression Of Evidence Seized Under A Valid Search Warrant That Is Untainted By An Unannounced Entry Does Not Further The Exclusionary Rule's Deterrence Purpose

The Court has described deterrence variously as the "prime purpose," *United States v. Calandra*, 414 U.S. 338, 347 (1974), the "primary justification," *Stone v. Powell*, 428 U.S. 465, 486 (1976), and the "'sole rational justification,'" *United States v. Janis*, 428 U.S. 433, 454 n.29 (1976), for the exclusionary rule. Underlying the theory of deterrence is an assumption that conduct in violation of the Fourth Amendment is motivated by a desire to obtain incriminating evidence for use at trial. *See New York v. Harris*, 495 U.S. 14, 20-21 (1990). Accordingly, the exclusionary rule has been invoked "to compel respect for the constitutional guaranty in the only effective way—by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 217 (1960).[3]

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police. (Pet.Br. 58-59; ACLU Br. 25-26.) The exclusionary rule, of course, provides no deterrence in such cases.

3. Although some decisions have alluded to "judicial integrity" as an additional rationale, "they demonstrate the limited role of this justification in the determination whether to apply the rule in a particular

Under that theory, the Court has deemed the social cost of excluding relevant evidence to be necessary to deter police from efforts to coerce a confession, *Chambers v. Florida*, 309 U.S. 227 (1940), to order unjustified detentions, *Terry v. Ohio*, 392 U.S. 1 (1968), and to conduct warrantless searches, *Chimel v. California*, 395 U.S. 752, 761, 767-768 (1969). On the other hand, the Court has deemed the exclusionary rule to be a costly and counterproductive sanction where the challenged police conduct is motivated not by a desire to gather evidence, but by independent concerns, most often the protection of themselves or others. *See, e.g., New York v. Quarles*, 467 U.S. 649, 655-657 (1984); *cf. Michigan v. Summers*, 452 U.S. 692, 701-702 (1981).

A decision by police officers to execute a search warrant by means of an unannounced entry falls into the latter category. (Pet.Br. 49 ("the policy of the common law rule of announcement was to protect against violence in [un]announced police invasions of the home"), 51.) Because a warrant grants police full authority to search the premises for the listed items, an unannounced entry is not necessary to obtain evidence. Thus, police would make an unannounced entry only (1) where they believe that their safety (or the safety of others) would be endangered by a noticed entry, *see Sabbath v. United*

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context." *Stone*, 428 U.S. at 485. Judicial integrity and deterrence both focus on the need to discourage violations of the Constitution and, hence, follow "essentially the same" inquiry. *Janis*, 428 U.S. at 458-459 n.35.

States, 391 U.S. 585, 589 (1968) ("another facet of the rule of announcement was, generally, to safeguard officers"); or (2) where they believe a noticed entry would result in the destruction of evidence. As Petitioner concedes (Pet.Br. 63), either of these justifications validates an unannounced entry. *See Ker v. California*, 374 U.S. 23, 40 (1963) (plurality opinion); *id.* at 47 (Brennan, J., dissenting); *Miller v. United States*, 357 U.S. 301, 309 (1958). Accordingly, the exclusionary rule is unnecessary to deter police misconduct.

Although much of police work is fraught with danger, service of warrants is particularly so. A neutral magistrate, by issuing the warrant, has already decided that evidence relating to a crime is likely to be found at a particular place. Although the officers may have some control over the timing of the search, the advantages otherwise lie with the suspects, as they are surely more familiar with the building's layout, the weapons they may have available, and the presence of others in the house. Moreover, they know their intentions, while an officer can only guess at the resolve of the suspects to fight, flee, or surrender. *See Maryland v. Buie*, 494 U.S. 325, 333 (1990); S. CHAPMAN, COPS, KILLERS AND STAYING ALIVE: THE MURDER OF POLICE OFFICERS IN AMERICA 82 (1986).

Once the officer makes known his or her purpose, the situation becomes what is termed a "fatal funnel": the suspect always knows where the officers will be (i.e., coming through the door) and need aim only at a fixed point and await a target.

> The entering officers, on the other hand, do not know the suspect's location when they enter. Typically, daylight outside will be brighter than the artificial light inside, so the officer's eyes take a period of time to adjust to the darker room. The suspect is located in a position of relative darkness, while the officers, entering a doorway with light at their backs, are silhouetted to the suspect. . . . All of these factors combine to render the police blind relative to the suspect.

Donald B. Allegro, Note, *Police Tactics, Drug Trafficking, and Gang Violence: Why The No-Knock Warrant Is An Idea Whose Time Has Come*, 64 NOTRE DAME L. REV. 552, 566 n.76 (1989).

The dangerous realities of police work have not escaped the attention of this Court, which places "great[] importance . . . in minimizing the risk of harm to the officers":

> [T]he execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence. The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command over the situation.

Michigan v. Summers, 452 U.S. at 702-703. Consequently, Petitioner does not dispute that self-protection is a justification for an unannounced entry. Pet.Br. 63; *see, e.g., Read v. Case*, 4 Conn. 166, 170 (1822); *Ker*, 374 U.S. at 40 (1963) (plurality opinion). Of course, in this case, the police had ample cause to fear that Petitioner would greet their warrant with violence: one day earlier, Petitioner had brandished an automatic pistol and had threatened the undercover informant "with serious physical injury or death" if the informant was working for the police. J.A. 15-16, 50.

Unfortunately, it is also true that *unannounced* entries can increase the risk to the officer. "Compliance [with the federal knock-and-announce statute] is . . . a safeguard for the police themselves who might be mistaken for prowlers and be shot down by a fearful householder." *Miller*, 357 U.S. at 313 n.12 (1958). Indeed, "one of the principal objectives of the English requirement of announcement of authority and purpose was to protect the arresting officers from being shot as trespassers." *Ker*, 374 U.S. at 58 (Brennan, J., dissenting).

Maneuvering between Scylla and Charybdis requires careful consideration and balancing of the risks by an officer who views this choice not as an academic exercise, but as a matter of life and death. Unlike the evidence-gathering motives that justify the exclusion of evidence in other contexts, an officer has no improper motive to choose one method of entry over another. *State v. Valentine*, 264 Or. 54, 504 P.2d 84, 90 (1972) ("police self-interest should dissuade police from making entries in

violation of the [knock-and-announce] statute"). We should not expect that the addition of a layer of judicial oversight, with the stick of the exclusionary rule, would much alter an officer's self-preservation calculus, "unless it is to make him less willing to do his duty." *Leon*, 468 U.S. at 920; *cf. New York v. Harris*, 495 U.S. at 20-21. Deterrence would come, if at all, by increasing the risks to those sworn to protect us.

Nor is the privacy interest protected by the knock-and-announce requirement sufficiently compelling to overlook the deficiencies in the exclusionary rule's ability to deter its violation. When an officer with a warrant announces his purpose, the occupant has no discretion to refuse entry. If permission is denied or even delayed for a short period, entry may be forced. The occupant has no cognizable privacy interest in hiding or destroying evidence of a crime, *Segura*, 468 U.S. at 815-816 & n.10, or in making an escape, *see Miller*, 357 U.S. at 309. If she plans none of these and is otherwise lawfully engaged, the most the knock would possibly prevent is a broken door, which is precisely the type of harm that is readily compensable in a tort or civil rights action. All that remains of the privacy interest in the few moments between announcement and entry is the opportunity of the occupant to avoid being surprised. Without belittling this shard of privacy, it hardly seems more compelling than the privacy interest invaded by the warrantless illegal entry and nineteen-hour seizure of the apartment in *Segura* or the forcible warrantless entry of the warehouse in *Murray*.

In addition, several lower courts, in reliance on *Sabbath*, 391 U.S. at 590 n.7 (noting that entries obtained by a ruse have been viewed as not involving a "breaking") and *Lewis v. United States*, 385 U.S. 206 (1966) (validating the use of undercover agents to obtain entry into dealer's home for purchase of narcotics), have held that the police are excused from announcing their identity and purpose when they use a ruse or subterfuge to gain entry to execute a warrant. *E.g., United States v. Stevens*, 38 F.3d 167, 170 n.1 (5th Cir. 1994); *State v. Myers*, 102 Wash. 2d 548, 689 P.2d 38, 40-43 (1984). If an officer is permitted to disguise his or her identity and purpose in order to gain entry to execute a warrant, the privacy interest remaining in the knock-and-announce rule must be small indeed.

Finally, it must be remembered, as a fact of "prime importance," that the entry and the subsequent search here were authorized by a *warrant*. *Summers*, 452 U.S. at 701. A neutral and detached magistrate had found probable cause to believe that the law was being violated in Petitioner's home and had authorized a substantial invasion of the privacy of the persons who resided there. *Id.*; *see also Michigan v. Tyler*, 436 U.S. 499, 513 (1978) (Stevens, J., concurring in the judgment) ("A warrant provides authority for an unannounced, immediate entry and search").

At bottom, the knock-and-announce requirement, much like restrictions on nighttime warrants, is a tool that protects civility, not privacy. *See United States v. Tedford*, 875 F.2d 446, 450-451 (5th Cir. 1989) (refusing to suppress

evidence seized during a warrant-search executed at night in violation of Fed. R. Crim. P. 41); *United States v. Schoenheit*, 856 F.2d 74, 76-77 (8th Cir. 1988) (same); *cf. Gooding v. United States*, 416 U.S. 430, 456-457 (1977) (interpreting federal statute to require "no special showing" for a nighttime search). Accordingly, several courts have declined to exclude evidence where the police failed to comply with a knock-and-announce requirement. *E.g., State v. Westlund*, 302 Or. 225, 229-230, 729 P.2d 541, 544 (1986) ("where the purpose of a statute is something other than the protection of privacy or property rights, the sanction of denying the state the use of evidence obtained by a statutory violation will not be applied"); *People v. Lamas*, 229 Cal. App. 3d 560, 570, 282 Cal. Rptr. 296, 301-302 (1991); *United States v. Hidalgo*, 747 F. Supp. 818, 832-835 (D.Mass. 1990); *see also Albritton v. United States*, 634 So. 2d 1114, 1117-1118 (Fla.App.), *rev. denied*, 641 So.2d 1344 (1994) (refusing to suppress gun, which was seized pursuant to a warrant, for failure to knock and announce prior to breaking an outer door).

The pragmatic analysis undertaken in *Segura*, *Murray*, and *Harris* leads inexorably to the same conclusion: that the exclusionary rule's purposes would not be effectively served here.

D. Prior Cases Ordering Suppression For Non-Compliance With 18 U.S.C. § 3109 Are Inapplicable Here

In *Sabbath v. United States*, 391 U.S. 585 (1968) and *Miller v. United States*, 357 U.S. 301 (1958), the Court

ordered suppression as a sanction for the violation of 18 U.S.C. § 3109, which provides:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

Neither *Sabbath* nor *Miller* requires or endorses suppression as a remedy here. In both cases, the Court was construing a federal statute requiring notice of authority and purpose. Having found a violation, the Court ordered suppression, under its supervisory power over the federal courts, to enforce the statute. *See Ker v. California*, 374 U.S. 23, 39 (1963) (plurality opinion); *id.* at 53 (Brennan, J., dissenting). In neither case did the Court consider whether the statute itself was required by the Constitution and, if so, what remedy was appropriate for its violation. *See Sabbath*, 391 U.S. at 591 n.8.

Here, of course, Arkansas does not have a statute equivalent to 18 U.S.C. § 3109 and, even if it did, the exclusionary rule would be an inappropriate sanction for its violation. *See California v. Greenwood*, 486 U.S. 35, 43-44 (1988) ("We have never intimated . . . that whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law of the particular State in which the search occurs"). Whether suppression

is appropriate for violation of any *constitutional* rule of announcement this Court might recognize depends on a balancing of the benefits of deterring police misconduct against the costs of excluding reliable evidence of criminal activity. *See id.* at 44. This pragmatic analysis differs substantially from the statutory interpretation undertaken in *Miller* and *Sabbath*, neither of which involved an entry authorized by a warrant and neither of which analyzed the appropriateness of the exclusionary sanction.

Although those issues may not have been important in fashioning a remedy for violation of a federal statute under the Court's supervisory power, they are a vital part of the inquiry under the exclusionary rule. Indeed, this Court has *never* ordered a state court to suppress evidence seized under a valid warrant. Petitioner has offered no basis for creating new law in this case.

CONCLUSION

For all of the foregoing reasons, the judgment of the Arkansas Supreme Court should be affirmed on the alternate ground that the exclusionary rule does not apply to evidence seized pursuant to a valid warrant, notwithstanding an antecedent unannounced entry.

Respectfully submitted,

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February 17, 1995

FOR ARGUMENT

(13)

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NO. 94-5707

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

SHARLENE WILSON

Petitioner,

vs.

THE STATE OF ARKANSAS

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARKANSAS

BRIEF OF WAYNE COUNTY, MICHIGAN AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT, THE STATE OF ARKANSAS

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STATEMENT OF THE QUESTION

I.

EVEN IF ANNOUNCEMENT BY THE POLICE OF THEIR PRESENCE AND PURPOSE IS ORDINARILY A REQUIREMENT UNDER THE FOURTH AMENDMENT BEFORE THE POLICE MAY MAKE FORCIBLE ENTRY TO EXECUTE A SEARCH WARRANT, WAS THE CONSTITUTIONAL STANDARD OF REASONABLENESS MET IN THIS CASE; FURTHER, EVEN IF THE STANDARD WAS NOT MET, DOES THE FOURTH AMENDMENT REQUIRE THE EXCLUSION OF EVIDENCE OBTAINED UNDER A VALID SEARCH WARRANT, AND DURING A SEARCH OF PROPER SCOPE, BECAUSE OF A VIOLATION OF PRINCIPLES OF ANNOUNCEMENT?

INTEREST OF THE AMICUS

Amicus is the County of Wayne, Michigan, by the Wayne County Prosecutor's Office. The Office of the Wayne County Prosecuting Attorney is the largest in the State of Michigan, and the issue before this Court has arisen in Michigan, leading to conflicting views by panels of the State's Court of Appeals. Thousands of search warrants are executed annually in the State, the greater proportion of them involving searches for narcotics, and thus the issue before the Court is of great interest and importance to a large metropolitan area such as the Detroit area.

Counsel for amicus has appeared before the Court on four occasions, and the Wayne County Prosecutor's Office has appeared on nine occasions. Amicus has also filed as amicus previously before the Court, as well as before the Michigan Supreme Court. The issue before the Court is of great

practical importance, and amicus desires to present its perspective for the possible assistance of the Court.

STATEMENT OF THE CASE

Amicus concurs with the statement of the case of the State of Arkansas, as Respondent.

ARGUMENT

EVEN IF ANNOUNCEMENT BY THE POLICE OF THEIR PRESENCE AND PURPOSE IS ORDINARILY A REQUIREMENT UNDER THE FOURTH AMENDMENT BEFORE THE POLICE MAY MAKE FORCIBLE ENTRY TO EXECUTE A SEARCH WARRANT, THE CONSTITUTIONAL STANDARD OF REASONABLENESS WAS MET IN THIS CASE; FURTHER, EVEN IF THE STANDARD WAS NOT MET, THE FOURTH AMENDMENT DOES NOT REQUIRE THE EXCLUSION OF EVIDENCE OBTAINED UNDER A VALID SEARCH WARRANT, AND DURING A SEARCH OF PROPER SCOPE, BECAUSE OF A VIOLATION OF PRINCIPLES OF ANNOUNCEMENT.

A. An Analytical Model of the Fourth Amendment

Neither space nor time (nor a sense of the appropriate) permit a detailed analysis of an analytical model of the Fourth Amendment. To set the stage for the question of whether there is an interplay between the reasonableness clause of the Fourth Amendment and common law knock and announce requirements, however, amicus will very briefly describe the analytical model of the Fourth Amendment amicus believes

best comports both with the text of the amendment as well as its history.

(1) The Warrant Preference Approach

The unanswered question of the Fourth Amendment is, when, in order for a given search to be reasonable, a warrant is required. The Fourth Amendment itself does not say, or at least does not address the question specifically. This lack of specificity has led to two principal approaches: 1)the reasonableness clause dominates the Fourth Amendment, and there is no specific requirement that searches be pursuant to warrant, but rather there are requirements which must be met when a warrant is employed; and 2)the warrant clause dominates the Fourth Amendment; that is, a search is not reasonable unless a warrant is employed, unless certain specific exceptions to this rule are met.

Presently, the second theory dominates, as it has for many years.

However, as Justice Scalia has pointed out, this dominance is at least to some extent "illusory," because the "warrant requirement" has "become so riddled with exceptions that it (is) basically unrecognizable." California v Acevedo, 500 US __, 114 L Ed 2d 619, 636 (1991)(Justice Scalia concurring). There is, under the warrant dominance or warrant preference theory, which allows for numerous exceptions, no logically coherent explanation for when a warrant is required--the rule is simply that a warrant is always required, except when it is not.

The view that there is "nothing in the Fourth Amendment itself (requiring) that searches be conducted pursuant to warrants," the relevant test being, instead, "not the reasonableness of the opportunity to procure a warrant, but the reasonableness of the seizure under all circumstances;" or, put another way, the

view that "The Fourth Amendment contains two separate Clauses, each flatly prohibiting a category of governmental conduct....the ultimate question is whether the category of warrantless searches (in question) is 'unreasonable' within the meaning of the first clause," has plainly, then, not prevailed. See Robbins v California, 453 US 420, 69 L Ed 2d 744, 101 S Ct 2841 (1981) (Justice Rehnquist, dissenting); Coolidge v New Hampshire, 403 US 443, 29 L Ed 2d 564, 91 S Ct 2022 (1971) (Justice Black, concurring and dissenting); Marshall v Barlows, 436 US 307, 56 L Ed 2d 305, 98 S Ct 1816 (1978) (Justice Stevens, dissenting). But a "warrant preference/exceptions" theory of the Fourth Amendment fails to explain why some searches may be accomplished without warrant, and why some require a warrant, and is inadequate to do so.

(2) The Fourth Amendment Text and Seizure-Directed Searches

There is, however, a textual analysis of the Fourth Amendment which is, amicus submits, faithful to the Fourth Amendment text and as well as its history, and which goes far toward explaining when a warrant is required and when one is not. The answer is found in the warrant clause itself--in the probable cause and particularity requirements. See Bartee, "The Fourth Amendment: An Immodest Proposal," 11 Am J Crim Law 293, 298 (1983).

The Fourth Amendment provides that "no warrant shall issue, but **upon probable cause**, supported by Oath or affirmation, and **particularly describing** the place to be searched, and the persons or things **to be seized**." Within the warrant clause is the particularity clause. Toward what kinds or types of searches is the warrant clause aimed? Those which have as their principal

purpose the discovery and seizure of criminal evidence of one sort or another, for the items sought "to be seized" must be particularly described in advance to the magistrate. The logical inference drawable from the particularity clause, then, is that a warrant is required for searches the principal purpose of which is to discover and seize criminal evidence, or property to which the government has a superior claim to possession, unless necessity (exigent circumstances) justifies search without warrant, or unless no warrant was required at the common law. See California v Acevedo, 114 L Ed 2d at 636-637 (Justice Scalia concurring).

Not only does the particularity requirement in the warrant clause support a theory that a warrant is ordinarily required for searches which are principally seizure-directed (and not for those which

are not principally seizure-directed), with an exception for exigent circumstances, but so also does the requirement of probable cause; that is, there must be facts and circumstances that would lead a reasonably prudent person to believe that the items sought are in the place to be searched. The very concept of probable cause encompasses a search which is directed at an anticipated seizure of particular items.

History lends further support to the seizure-directed search approach to the warrant requirement. The Framers concern was with searches which were aimed at the discovery and seizure of things, searches which should require a specific warrant (and not a general warrant, or writ of assistance), as well as probable cause to believe the items will be found in the place to be searched. Indeed, as the dissents to Camara v Municipal Court, 387 US 523, 87 S Ct 1727, 18 L Ed 2d 930

(1967) and See v Seattle, 387 US 541, 18 L Ed 2d 943, 948, 87 S Ct 1737 (1967) and the opinion of the Court in the repudiated Frank v Maryland, 359 US 360, 3 L Ed 2d 877, 79 S Ct 804 (1959) make clear, nonseizure-directed warrantless searches, such as regulatory inspections, have their antecedents deep in our colonial history. At the same time that colonists railed against the general warrant, and at the beginning of the Nation under the Fourth Amendment adopted to cure the abuse of the general warrant, regulatory searches without warrant not only were allowed but greatly expanded--these searches were not "seizure-directed," not anticipating, with probable cause, the discovery and seizure of any items.

(3) The Reasonableness Clause and Searches Pursuant to Warrant

This is not to say that searches which are not seizure-directed fall outside the

Fourth Amendment, but that they fall outside the warrant clause (for example, inventory searches, searches incident arrest, and other searches which do not require probable cause to anticipate the discovery and seizure of items because their principal purpose is not to discover evidence of criminality). These searches still fall within the reasonableness clause of the Fourth Amendment, and the concerns of the Court in Camara and See regarding the possible unreasonable execution of inspection searches could be obviated without imposing a warrant requirement which the text simply will not brook. Indeed, as Justice Stevens has pointed out, there are circumstances where a warrant may supply less protection for an inspection search than ought to be required by the reasonableness clause of the Fourth Amendment. See e.g. Michigan v Clifford, 464 US 287, 78 L Ed 2d 477, 104 S Ct 641

(1984) (Justice Stevens, concurring). See also Wyman v James, 400 US 309, 27 L Ed 2d 408, 91 S Ct 381 (1971).

Searches which are seizure-directed, and which are neither undertaken under exigent circumstances, nor under circumstances where no warrant was required at the common law, do, then require a warrant in order to be reasonable by the terms of the warrant clause itself. This does not, however, end the constitutional inquiry--it does not mean that because, in order to be reasonable, a warrant is required in these circumstances, any search undertaken pursuant to a proper warrant is itself permissible, for even that search is subject itself to the reasonableness clause of the Fourth Amendment, which applies to all searches, both unwarranted and warranted.

A search undertaken pursuant to warrant, then, must be reasonable in two senses. First, there is a sort of reasonableness internal to the warrant clause itself, and that is the question of scope and intensity; did the search undertaken exceed that appropriate to discover items for which the warrant authorized a search? Second, even as to searches within the proper scope authorized by the warrant, by application of the reasonableness clause these searches themselves must be reasonably executed. This brings us (perhaps at last!) to the issue at hand: does application of the reasonableness clause to the execution of warranted searches lead to the conclusion that before a forcible entry may be made to search premises there must be an announcement by the police of their presence and purpose, unless lack of an announcement is justified under one of

several exceptions (principally, justifiable fear of loss of the evidence; justifiable fear of harm; or justifiable belief that to announce is, under the circumstances, an empty gesture)? That inquiry must begin with the common law.

B. The Common Law, And Fourth Amendment "Reasonableness"

Before examining the common law with respect to the issue of "knock and announce" before a search warrant is executed, it is first necessary, amicus believes, to decide whether the common law on the point makes any difference with regard to interpretation of the Fourth Amendment and the requirement that all searches be reasonable. Amicus submits that the common law is of utmost importance to the question, as demonstrated by cases from the Court.

That common law traditions inform judgments regarding the meaning of the

Fourth Amendment is beyond question, and therefore the point will not long be labored here. A mere sampling of cases from this Court makes the point. In Gerstein v Pugh, 420 US 103, 43 L Ed 2d 54, 95 S Ct 854 (1975), for example, the Court held that the Fourth Amendment "requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest," the Court grounding its decision in large part on the fact that its result had "historical support in the common law that has guided interpretation of the Fourth Amendment" (43 L Ed 2d at 64, emphasis supplied).

The Court looked to common law principles for guidance in United States v Watson, 423 US 411, 46 L Ed 2d 598, 96 S Ct 820 (1976) in determining that no arrest warrant is needed for an arrest in a public place. Canvassing authorities such as

Blackstone, Hale, and English cases, the Court observed that "The cases construing the Fourth Amendment thus reflect the ancient common-law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable grounds for making the arrest," 46 L Ed 2d at 606-607, noting further that "The balance struck by the common law in generally authorizing felony arrests on probable cause, but without a warrant, has survived substantially intact." 46 L Ed 2d at 608. See also the concurring opinion of Justice Powell, 46 L Ed 2d at 612-613.

In Payton v New York, 445 US 573, 63 L Ed 2d 639, 100 S Ct 1371 (1980) the Court considered whether warrantless entries into the dwelling to achieve arrests based on probable cause are permissible. Though

concluding not, both the majority and the dissent looked heavily to the common law, the majority concluding that the authorities regarding the common law rule revealed a deep divergence of opinion among scholars, and very few judicial opinions. The majority thus concluded that its study of the relevant common law simply did not provide sufficient guidance to inform the decision, 63 L Ed 2d at 658, the dissent taking issue with the majority on its understanding of the common law on the question, and being of the view that the "Fourth Amendment was directed towards safeguarding the rights at common law...." 63 L Ed 2d at 665. Similarly, in Steagald v United States, 451 US 204, 68 L Ed 2d38, 101 S Ct 1642 (1981) the majority of the Court declined to use the common law as a guide to decision of the question whether entry into the home of a third party to arrest a nonresident can be accomplished

without a search warrant because "the common law...sheds relatively little light on the narrow question before us...." 68 L Ed 2d at 50.

The Court turned to the common law in Oliver v United States, 466 US 170, 80 L Ed 2d 214, 104 S Ct 1735 (1984) as an aid to determining whether the term "houses" in the description of the Fourth Amendment as to that which is protected from unreasonable searches and seizures ("persons, houses, papers, and effects") includes open fields, or is limited to the curtilage of the dwelling. See 80 L Ed 2d at 225, the Court finding that, as Justice Holmes had said, the difference between the curtilage and the open field is as "old as the common law." See also California v Ciraolo, 476 US 207, 90 L Ed 2d 210, 106 S Ct 1809 (1986); Dow Chemical v United States, 476 US 227, 90 L Ed 2d 226, 106 S

Ct 1819 (1986); United States v Dunn, 480 US 294, 94 L Ed 2d 326, 107 S Ct 1134 (1987).

Finally, the question in California v Hodari D., 499 US 621, 113 L Ed 2d 690, 111 S Ct 1547 (1991) was whether an individual in full flight can be considered "seized" under the Fourth Amendment because of the objective manifestation of the police of a desire to seize him. The Court looked to the common law to reject this rather extravagant claim of meaning of the word "seizure." See 113 L Ed 2d at 696-697.

The foregoing is but a sampling of the many cases in which the Court has turned to the common law as an aid to determining that which is encompassed within the protections provided by the Fourth Amendment. Plainly it can at least be said that practices at common law are highly relevant to understanding the protections

supplied by the text of the Fourth Amendment. More particularly, then, they are relevant to the question of whether the reasonableness clause requires that warranted searches of premises be preceded by an announcement from the police of their presence and purpose, and, if so, what the contours of that requirement are, as well as the scope of any exceptions to it.

C. There Was A Common Law Requirement of Announcement of Presence and Purpose Before Forcible Entry to Execute A Warrant, Which Informs the Reasonableness Clause

(1) The Common Law Requirement

The opinions of both the Arkansas Supreme Court in this case, and of the Michigan Court of Appeals in People v Polidori, 190 Mich 673 (1991), followed by operation of the Michigan conflict resolution rule in People v Asher, 203 Mich App 621 (1994) (the panel indicating it otherwise would have reached a different

result), and reaching opposite conclusions, are unfortunate in the brevity of their analyses. The opinion of the Arkansas Supreme Court in Wilson v State, 878 SW2d 755 (Ark, 1994), in response to the argument of the defendant that the entry of the officers violated the Fourth Amendment because the officers did not announce their presence and purpose prior to entering the residence to execute the search warrant, states only that "There is no authority for Ms. Wilson's theory that the knock and announce principle is required by the Fourth Amendment." 878 SW2d at 758. The opinion of the Michigan Court of Appeals in Polidori, reaching the opposite result, says only that "we agree with a number of other jurisdictions that the requirement that officers identity themselves and state their authority and purpose before entering a private residence has its roots in the Fourth Amendment." 190 Mich App at 676.

There is, of course, authority on the question, authority not unfamiliar to this Court.

Amicus will not equivocate on the point: common law practices, and early English decisions, do reveal a requirement of announcement of presence and purpose on the part of government authorities before making forcible entry into private premises, a requirement which, then, informs our understanding of the reasonableness clause of the Fourth Amendment (and ought also to inform our understanding of the exclusionary rule, none of the cases establishing the knock and announce principle being a criminal case requiring the exclusion of evidence seized in "violation" of knock and announce principles). Though most of the early sources concern entry to arrest rather than to search, it seems clear that the same principles should govern both sorts of

entry.

Again, the early authority regarding the question is not unknown to the Court. The most oft-cited case is Semayne's Case, 77 Eng Rep 194, 195 (1603), where it was said that "in all cases when the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K(ing)'s process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors...." American courts quickly began to make the same point. See Bell v Clapp, 10 Johns.R. 263 (NY Sup Ct 1813); see generally Blakey, The Rule of Announcement and Unlawful Entry: Miller v United States and Ker v California, 112 Pa L Rev 499 (1964). This Court, though it has never held that the Fourth Amendment reasonableness clause requires announcement of presence and

purpose in ordinary circumstances before forcible entry may be made to execute a search warrant, has itself discussed the common law requirement, recognizing that at the common law announcement of presence and purpose was required in ordinary circumstances. See Miller v United States, 357 US 301, 2 L Ed 2d 1332, 78 S Ct 1190 1958); and Ker v California, 374 US 23, 10 L Ed 2d 726, 83 S Ct 1623 (1963) (where it appears that four members of the Court would have found the announcement of presence and purpose requirement in the reasonableness clause).

If, then, the common law practices inform our understanding of the Fourth Amendment, and if at the common law announcement of presence and purpose was ordinarily required before forcible entry to execute a warrant could be justified, then amicus believes that announcement of

presence and purpose is required, in ordinary circumstances, by the reasonableness clause of the Fourth Amendment. However, the rule is not without exceptions: there are circumstances where a forcible entry to execute a warrant is permissible absent announcement of presence and purpose, as the common law itself recognized.

(2) The Exceptions To The Common Law Rule

That the reasonableness clause does not require that police executing a search warrant knock and announce their presence and purpose in some circumstances is universally accepted, and without controversy. Essentially, announcement of presence and purpose before forcible entry may be undertaken is not required when, considering the purpose of the warrant, it would in fact be unreasonable to require the police to do so. The purpose of the

search warrant is to allow the police to search for and to seize items named in the warrant, and, of course, to do so in safety. See Michigan v Summers, 452 US 692, 69 L Ed 2d 340, 101 S Ct 2587 (1981). Announcement of presence and purpose assures that forcible entry will not result in destruction of property, and possibly cause violence itself, unless peaceful entry is directly or indirectly refused. Where announcement of presence and purpose, then, will lead either to frustration of the warrant through destruction or concealment of the items sought, or is dangerous to the officers executing the warrant, or is a "useless gesture" because it is clear from the facts surrounding the executing of the warrant that those present were aware that the police were present and of their purpose, the reasonableness clause does not require the announcement of presence and purpose as a prerequisite to

forcible entry. Again, these principles are universally accepted and long established. See generally 2 LaFave, Search and Seizure, sec. 4.8(d), (e), and (f).

D. Reasonableness and Knock and Announce in the 20th and 21st Centuries

Amicus is firmly of the belief that the Constitution does not "change with the times," with those changes being made by judges; rather, if the People so desire, the Constitution may be changed through the amendment process, as it has been on many occasions, and as the Constitution itself plainly contemplates. Certainly the concepts or principles expressed in the Constitution may be applied to circumstances not envisioned by the Framers, but the concepts themselves--the Constitution itself--remains constant.

A thorough examination of the appropriate method of constitutional interpretation cannot be undertaken here, but amicus would pause a moment to point to several statements by giants of Michigan jurisprudence on the point--giants in jurisprudence at the time of their service, and giants in our nation's history. Justice Thomas Cooley, in his celebrated work Constitutional Limitations (1868; Legal Classics Library Edition, 1987), stated that "The object of construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it." Cooley, at 55 (emphasis in the original). This method of construction is a part of our jurisprudential history. The court is to "declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the constitution is fixed when it is

adopted, and it is not different at any subsequent time when a court has occasion to pass upon it." Cooley, at 55.

Another giant of Michigan jurisprudence, and contemporary of Justice Cooley on the Michigan Supreme Court, Justice Campbell, put it this way in People v Blodgett, 13 Mich 127, 138 (1865): "The meaning of our constitution was fixed when it was adopted, and the question which is now before us is not different from what it would have been had the constitution been recently adopted....Constitutions cannot be changed by events alone. They remain binding as the acts of the people in their sovereign capacity, as the framers of government, until they are amended or abrogated by the action prescribed by the authority which created them."

This does not, however, mean that the constitution is "static" in that it cannot

be applied to unforeseen events or developments (such as modern technology) --surely, its principles can be applied to new or changed circumstances, as Justice Campbell himself recognized over 125 years ago: "That the constitution means nothing now that it did not mean when it was adopted, I regard as true beyond doubt. But it must be regarded as meant to apply to the present state of things as well as to all other past or future circumstances." Blodgett, at 140 (emphasis added). The principles do not change--the constitution does not change to meet the times--the constitution is simply capable of application to new or different circumstances.

Assuming that at the common law there was a requirement of announcement of presence and purpose before a forcible entry to execute a warrant could be made, and assuming that the reasonableness clause

of the Fourth Amendment is informed by common law practices, it is also true that there are exceptions to the knock and announce requirement. How is the requirement itself to be viewed, and what is the scope of its exceptions, in a modern world?

In Minnesota v Dickerson, __US__, 124 L Ed 2d 334 (1993), Justice Scalia, while concurring with the majority, expressed concern regarding the "frisk" component of Terry v Ohio, 392 1, 20 L Ed 2d 889, 88 S Ct 1868 (1968). Justice Scalia agreed that the "stop" portion of Terry comports with common law practices, see 124 L Ed 2d at 349, but could find no common law precedent for any physical search incident to that stop. 124 L Ed 2d at 349. In remarks consistent with the views of Justices Cooley and Campbell quoted previously, Justice Scalia explained that common law practices are important to the

constitutional inquiry because, in his view, a view with which amicus agrees, it is a "fundamental principle of constitutional adjudication that the terms in the Constitution must be given the meaning ascribed to them at the time of their ratification." 124 L Ed 2d at 348. However, just as Justice Campbell further cautioned that it is also true that the Constitution "must be regarded as meant to apply to the present state of things as well as to all other past or future circumstances," Justice Scalia agreed that even if a frisk prior to arrest would have been impermissible in 1791, or in 1868 when the Fourteenth Amendment was adopted, it might well be that "it is only since that time that concealed weapons capable of harming the interrogator quickly and from beyond arm's reach have become common--which might alter the judgment of what is 'reasonable' under the original

standard." 124 L Ed 2d at 350. Similarly, the question here is the application or scope of the reasonableness standard, which is informed by common law practices--a requirement of announcement of presence and purpose before forcible entry to execute a search warrant, with exceptions to the requirement when there is sound reason to believe announcement will frustrate the purpose of the warrant, will lead to harm of the executing officers, or is an "empty gesture" because it is clear from the circumstances that those inside are already quite aware of the presence and purpose of the police--in a modern world which is, in terms of possible harm to officers executing warrants and possible frustration of warrants through destruction of evidence (especially in drug cases), quite different from the world of 1791 and that of 1868.

Amicus would point to one other case demonstrating that common law principles

may be applied somewhat differently to a changed world. In Tennessee v Garner, 471 US 1, 85 L Ed 2d 1, 105 S Ct 1694 (1985) this Court considered the degree of force permissible under the reasonableness clause in order to effectuate the arrest of a fleeing felon. Justice White, writing for the Court, recognized that at the common law whatever force was necessary to effect the arrest of a fleeing felon was permissible, including deadly force, without regard to whether the felony which had been committed was a violent one, and without regard to any standard of cause as to whether the fleeing felon was armed, citing to Hale and Blackstone. While agreeing that this Court has "often looked to the common law in evaluating reasonableness, for Fourth Amendment purposes," Justice White also expressed the view that common law practices do not necessarily govern where there has been a

"sweeping change in the legal and technological context...." 85 L Ed 2d at 11.

Justice White turned then to the "sweeping change in the legal and technological context," noting, among other things, that the common law rule arose at a time when virtually all felonies, including nonviolent felonies, were punishable by death, and at a time when many offenses now classified as felonies were either misdemeanors or did not exist. Further, technology with regard to weaponry has changed from the time of the common law rule, where deadly force "could be inflicted almost solely in a hand-to-hand struggle during which, necessarily, the safety of the arresting officer was at risk." 85 L Ed 2d at 12. Because, then, the premises underlying the common law rule simply no longer exist, the common law rule could not, held the Court, supply the

reasonableness test under the Fourth Amendment, at least not entirely.

Caution and restraint, however, must be exercised when, in construing reasonableness under the Fourth Amendment, the Court departs from common law practices, for the Court is then open to the charge of legislating, and to illegitimacy. Indeed, amicus would contend that Garner itself pushes the outer edges of appropriate judicial construction of the Constitution. The issue of the relationship between the reasonableness clause and announcement of presence and purpose before a warrant is executed in light of modern developments both in terms of weaponry, and therefore danger to the officers executing the warrant, and the ready disposability of contraband, and consequently the frustration of the warrant, however, does not require the sort of abrogation of a common law principle as

in Garner, but simply the recognition that the purposes underlying the understood exceptions to the "knock and announce" requirements extend to situations today not envisioned at the common law, so that the "knock and announce" requirement may be dispensed with in certain classes of searches on a blanket basis, consistent with the reasonableness clause.

The question becomes whether announcement of presence and purpose may be excused on the ground of a reasonable fear of destruction of the items sought through the warrant and a reasonable fear of injury to executing officers if presence and purpose are announced in certain classes of cases, or can only be determined on an individual case-by-case basis. Consistent with the remarks of Justice Scalia concurring in Minnesota v Dickerson, amicus would point out that it is quite clear that circumstances have changed since 1791, and

since 1868 when the Fourteenth Amendment was adopted, changes "which might alter the judgment of what is 'reasonable' under the original standard." Indeed, the position of amicus is in fact more limited--it is not that the standard of reasonableness has altered, it is that reasonableness may be <u>demonstrated</u> in an unannounced forcible entry to execute a search warrant for the same reasons it has always been deemed reasonable, but that showing may, in light of modern circumstances, now be made in certain classes or categories of cases.

The recent case of <u>State</u> v <u>Stevens</u>, 511 NW2d 591 (Wis, 1994) demonstrates the acceptance of a categorical finding of reasonableness by a State Supreme Court. Though the Wisconsin Supreme Court noted, and correctly, that this Court has yet to decide the question of whether the Fourth Amendment reasonableness clause requires, in ordinary circumstances, that the police

knock and announce before forcible entry is made to execute a search warrant, the court considered a categorical exception to its own common law knock and announce rule.

Announcement of presence and purpose serves, said the court, to protect officers and others by warning the occupants of the officers' impending entrance; it protects the occupants limited privacy interests where the police have judicial authorization to enter and search; and it helps prevent the physical destruction of property. Where these interests would not be served, or would be counterproductive to safety and lead to frustration of the warrant, it is not reasonable to require that the police knock and announce. 511 NW2d at 595. Can it be said, in a class of cases, that it is reasonable for the police to believe that knocking and announcing will lead to frustration of the warrant and

danger to themselves? The Wisconsin Supreme Court answered in the affirmative.

The specific holding of the court was that "when the police have a search warrant, supported by probable cause, to search a residence for evidence of delivery of drugs or evidence of possession with intent to deliver drugs 'evidence of drug dealing', they necessarily have reasonable cause to believe exigent circumstances exist. Thus, in all such searches the police are justified in dispensing with the rule of announcement and making a no-knock entry." 511 NW2d at 595 (emphasis added).

In a modern world it is clear, said the court, that the object of the search warrant in drug cases is easily capable of destruction: "Several jurisdictions have acknowledged that most drugs are easily disposed of using standard plumbing." 511 NW2d at 595. The court observed that "At least six other courts have adopted such a

'blanket' exception to the rule of announcement." 511 NW2d at 596 (citations omitted). See also United States v Moore, 956 F2d 843, 850 (CA 8, 1992): "It is reasonable for police officers to assume that suspects selling illegal drugs in small quantities from a residence that has normal plumbing facilities will attempt to destroy those drugs if officers knock before a search warrant is executed."

Moreover, with regard to the dangers of unannounced entry, the court found that the assumption that unannounced entry might lead to violence as opposed to announced entry which would not is "no longer valid in today's drug culture. In fact, by announcing their presence, police may actually increase the likelihood for violence. 'The law has 'uniformly...recognized that substantial dealers in narcotics possess firearms and that such weapons are as much tools of the

trade as more commonly recognized drug paraphernalia.'" 511 NW2d at 596. See also Bureau of Justice Statistics, A National Report: Drugs, Crime, and the Justice System, at 5 (Dec, 1992): "To avoid being arrested and punished for trafficking, drug dealers commit violence crimes against police...."

The historical notion that following the rule of announcement is more likely to prevent violence the court simply found untrue in the context of drug searches, where "Police departments and commentators have determined that the police can decrease the possibility for violence during a search by taking control of the situation quickly." 511 NW2d at 597. The court thus found that the purpose of knock and announcement of avoiding injury to the executing officers and to occupants of the building is in fact disserved in certain drug cases.

In neither 1791 nor 1868 did today's drug problem exist, where thousands of search warrants are executed with regard to a class of contraband which is readily disposable, with the means of disposal, modern plumbing, readily reachable after the police knock and announce that they are there to search for and seize this very contraband. Nor did modern weaponry exist at these times. It has always been permissible under the reasonableness clause to make forcible entry to execute a warrant without knocking and announcing when the purposes served by knocking and announcing would not be served by so doing. Amicus simply submits that today it is demonstrably true that as to certain classes of cases those purposes are not only not served, but are disserved by knocking and announcing. It is permissible, then, under our Federal system for a state to choose to allow forcible

entry without knocking and announcing in these classes of cases, as the Constitution will not be violated by this method of search warrant execution. Should a state choose to reach another conclusion under its own constitution, common law, or statutory law, that is its choice, and a part of our Federalism. But the Fourth Amendment reasonableness clause allows the choice where the purposes of knocking and announcing are not served, and allows the States to make that determination on a categorical or "class" basis.

E. Application Of A Rule of Exclusion of Evidence To Knock and Announce Violations

Amicus would submit that even if it is found in a particular case that, whatever the scope of the requirement of announcement of presence and purpose, that requirement has been violated, there remains the critical question of whether

exclusion of evidence as a consequence is appropriate, and amicus submits that it is not, and would note that none of the early English cases concerning the announcement requirement are criminal cases excluding evidence, but instead are civil suits for damages.

Assume several examples: 1)the police enter a home and search it with no warrant at all, and no exigent circumstances or any other independent justification; 2)the police enter a home and search with a search warrant in areas within the home where the items sought could not possibly be found, finding other seizable items instead, and 3)the police enter a home and search it pursuant to a search warrant, finding the items sought in a search of proper scope and intensity, but after having failed to wait after knocking on the door and announcing their presence and purpose for a time sufficient to allow a

person in the room furthest from the door to answer. In the first two situations the invasion of privacy simply should not have occurred at all. In the first, the entry into the dwelling should never have occurred; in the second, the search of certain places within the dwelling should never have occurred. The evidence should never have been discovered, privacy should never have been violated, and exclusion is the result. But in the third situation, with a valid search warrant, and a search of proper scope, but a "timing" error with regard to entry, was the invasion of privacy--the entry into the home and the search--proper? Surely it **was**--the police had a right under law to make it. Was the seizure of property appropriate? Surely it **was**--the police had a right under law to seize it. Does employing the **same** "sanction" where the police had every right to search and seize, but entered too

quickly, as when the police had no right to invade premises and seize property at all make any sense? Surely **not**--in two privacy has been improperly invaded; in the latter, the knock and announce "failure," it has been validly invaded. Only if knocking and announcing has as a purpose that those inside should be given a fair opportunity either to destroy the evidence sought or to injure the officers executing the warrant does exclusion of the evidence in this situation make sense. These violations are simply different in kind, and, most respectfully, amicus submits that it is myopic to treat them as though they were no different at all. As Chief Justice Warren noted, in a slightly different context:

> "The exclusionary rule has its limitations as a tool of judicial control....[In] some contexts the rule is ineffective as a deterrent....Proper adjudication of cases in which the exclusionary rule is invoked demands a constant awareness of

> these limitations....[A] rigid and unthinking application of the...rule...may exact a high toll in human injury and frustration of efforts to prevent crime." Terry v Ohio, 392 US 1, 13-15; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

Exclusion of evidence where there has been a valid invasion of privacy, and a proper discovery and seizure of evidence, then, is not, amicus submits, an appropriate sanction for police "error" with regard to announcement of presence and purpose.

CONCLUSION

WHEREFORE, amicus requests that this Honorable Court affirm the judgment of the Arkansas Supreme Court.

Respectfully submitted,

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